No. 06-9130

Title: Abdus-Shahid M. S. Ali, Petitioner

v.

Federal Bureau of Prisons, et al.

Docketed: January 30, 2007

Lower Ct: United States Court of Appeals for the Eleventh Circuit

Case Nos.: (06-11468)

Decision Date: October 19, 2006

Questions Presented

---Date---	--------Proceedings and Orders----------
Jan 5 2007	Application (06A696) to extend the time to file a petition for a writ of certiorari from January 17, 2007 to March 8, 2007, submitted to Justice Thomas.
Jan 17 2007	Application (06A696) granted by Justice Thomas extending the time to file until March 8, 2007.
Jan 25 2007	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 1, 2007)
Feb 23 2007	Order extending time to file response to petition to and including April 2, 2007.
Mar 30 2007	Order further extending time to file response to petition to and including May 2, 2007.
May 2 2007	Brief of respondents Federal Bureau of Prisons, et al. filed.
May 8 2007	Reply of petitioner Abdus-Shahid M. S. Ali filed.
May 9 2007	DISTRIBUTED for Conference of May 24, 2007.
May 29 2007	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jun 12 2007	Motion to appoint counsel filed by petitioner Abdus-Shahid M. S. Ali.
Jun 20 2007	Motion DISTRIBUTED for Conference of September 24, 2007.
Jun 29 2007	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 20, 2007.
Jun 29 2007	The time within which to file respondent's brief on the merits is extended to and including August 31, 2007.
Jul 10 2007	Further extension of time to and including July 31, 2007, within which to file the joint appendix and petitioner's brief on the merits.
Jul 10 2007	Further extension of time to and including September 24, 2007, within which to file respondents' brief on the merits.
Jul 31 2007	Joint appendix filed.
Jul 31 2007	Brief of petitioner Abdus-Shahid M. S. Ali filed.
Aug 8 2007	Statement of cost for printing the joint appendix received pursuant to Rule 26.
Aug 25 2007	CIRCULATED.

Aug 30 2007	SET FOR ARGUMENT Monday, October 29, 2007.
Sep 12 2007	Record received from U.S.C.A. for 11th Circuit. (1envelope)
Sep 14 2007	Record received from U.S. District Court for the Northern District of Georgia. (1 box)
Sep 24 2007	Brief of respondents Federal Bureau of Prisons, et al. filed.
Sep 25 2007	Motion to appoint counsel filed by petitioner GRANTED. Jean-Claude Andre, Esquire, of Los Angeles, California is appointed to serve as counsel for the petitioner in this case.
Oct 22 2007	Reply of petitioner Abdus-Shahid M. S. Ali filed. (Distributed).
Oct 29 2007	Argued. For petitioner: Jean-Claude Andre, Los Angeles, Cal. (Appointed by this Court.) For respondents: Kannon K. Shanmugam, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

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(4)

No. 06-9130

Jan 25, 2007

IN THE SUPREME COURT OF THE UNITED STATES

ABDUS-SHAHID M.S. ALI, PETITIONER

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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January 2007

QUESTION PRESENTED

Under 28 U.S.C. 2680(c), the Federal Tort Claims Act's waiver of sovereign immunity does not extend to "[a]ny claim arising in respect of * * * the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." The question presented, over which ten circuits are divided six-to-four is:

Whether the term "other law enforcement officer" is limited to officers acting in a tax, excise, or customs capacity.

PARTIES TO THE PROCEEDINGS

Petitioner is Abdus-Shahid M.S. Ali.

Respondents are the Federal Bureau of Prisons (BOP); Harley Lappin (Director of the BOP), R. Wiley (Warden of United States Penitentiary in Atlanta (USP Atlanta)), Daniel Quinones (Inmate Systems Officer at USP Atlanta), and the United States.

R.E. Holt (Director of the Southeast Region of BOP) was originally named as a defendant in the district court but was removed in petitioner's amended complaint, was not an appellee in the court of appeals, and is not a respondent here.

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OPINIONS BELOW

The unreported opinion of the court of appeals (App., infra, 1a-7a) is available at 2006 WL 2990216. The unreported order of the district court (App., infra, 8a-21a) is available at 2005 WL 1079299.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2006. On January 17, 2007, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 8, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, provides in pertinent part:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * * *
>
> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—
>
> > (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
> >
> > (2) the interest of the claimant was not forfeited;
> >
> > (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
> >
> > (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

28 U.S.C. § 2680(c).

STATEMENT

1. Enacted in 1946, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, waives the sovereign immunity of the United States with respect to certain tort

suits and renders it liable for injuries caused by the tortious acts of federal employees "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. This "broad waiver of sovereign immunity" is qualified by various exceptions set forth in 28 U.S.C. 2680 - thirteen in all - when applied to certain categories of claims.[1] Smith v. United States, 507 U.S. 197, 206-07 (1993). If one of the exceptions applies, the bar of sovereign immunity remains. The subsection at issue in this case is Section 2680(c), which reserves sovereign immunity for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."[2]

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[1] For example, there are exceptions for claims involving the mishandling of mail (Section 2680(b)), the imposition or establishment of a quarantine (Section 2680(f)), damages caused by the fiscal operations of the Treasury or by regulation of the monetary system (Section 2680(i)), the combatant activities of the military (Section 2680(j)), the activities of the Tennessee Valley Authority or the Panama Canal Company (Section 2680(*l*) and (m)), and the activities of federal land banks (Section 2680(n)).

[2] Prior to 2000, when Congress passed the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202, Section 2680(c) provided that the FTCA does not apply to a claim arising out of the detention of "any goods or merchandise." 28 U.S.C. 2680(c) (1994). CAFRA struck from Section 2680(c) the words "any goods or

2. Petitioner is a prisoner in the custody of the United States Bureau of Prisons (BOP). He currently is incarcerated at United States Penitentiary Big Sandy (USP Big Sandy) in Inez, Kentucky, to which he was transferred on December 3, 2003, after spending twenty-eight months at United States Penitentiary Atlanta (USP Atlanta). App., infra, 9a.

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merchandise" and inserted "any goods, merchandise, or other property" in their stead. CAFRA § 3(a)(1), 114 Stat. at 211. CAFRA also added at the end of Section 2680(c) an exception to the exception, which clarified that the United States' immunity is waived for:

> any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if–
>
> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> (2) the interest of the claimant was not forfeited;
>
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

28 U.S.C. 2680(c).

Before being transferred, petitioner put his property in two duffel bags and brought them to USP Atlanta's Receiving and Discharge Unit (R&D Unit), where the property was to be inventoried, packaged, and sent to USP Big Sandy. See BOP Program Statement No. 5800.12, Receiving and Discharge Manual, Ch. 4 (Dec. 31, 1997) <http://www.bop.gov/policy/progstat/5800_012.pdf>. The officer in charge, respondent Daniel Quinones, told petitioner to leave his property with him at the R&D Unit and that he would "get to it in a day or so and ship everything to USP Big Sandy." App., infra, 9a. Petitioner complied. He closed and locked the two duffle bags and left them in the R&D Unit with respondent Quinones. He was not present when his items finally were inventoried, packaged, and shipped to USP Big Sandy on or about December 8, 2003. Id. at 9a-10a.

When petitioner's duffle bags were returned to him at USP Big Sandy's R&D Unit, he noticed that several religious and personal items were missing and so informed the R&D staff.[3] Staff members told him "to sign for what he got because that was all that they had been sent." Id. at 10a. Petitioner was also "informed that if some of his property

[3] The district court provided a specific list of items missing from petitioner's property at App., infra, 10a-11a.

was missing then he should file a Federal tar [sic] claim" and was given the standard Form 95 for property claims. Ibid. Petitioner did as he was told. He signed for his property and recorded the missing items. He also reviewed the inventory slip filled out by respondent Quinones at USP Atlanta and discovered that the missing property was never inventoried in Atlanta. Ibid.

3. Petitioner filed an administrative tort claim with the BOP's Southeast Regional Office Director on December 30, 2003, to recover the value of his missing items. On August 11, 2004, he received a letter from the Southeast Regional Office, stating that his administrative tort claim was denied. Id. at 12a-13a.[4]

4. On October 12, 2004, petitioner filed this action alleging that respondents were liable under the FTCA for the loss of his property.[5] Id. at 8a, 13a. The district

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[4] Respondents have conceded that petitioner exhausted his FTCA administrative remedies. App., infra, 18a.

[5] Petitioner also brought claims alleging that respondents violated his rights under (1) the Religious Freedom Restoration Act of 1995, 42 U.S.C. 2000bb et seq.; (2) the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc et seq.; and (3) the First, Fourth, and Fifth Amendments to the United States Constitution. App., infra, 2a, 8a & n.1, 13a.

The district court dismissed these claims without prejudice on the basis that petitioner failed to exhaust his administrative remedies, as required by the Prison Litigation Reform Act. Id. at 17a. The court of appeals

court dismissed petitioner's FTCA claim with prejudice for lack of subject matter jurisdiction. It held that "the [Bureau of Prisons] and USP-Atlanta employees had detained [his] property within the meaning of 28 U.S.C. § 2680(c)," and, therefore, his FTCA "claim against the United States was not authorized by the FTCA," because it "is barred by the doctrine of sovereign immunity and must be dismissed for lack of subject matter jurisdiction." Id. at 16a-17a.

5. The court of appeals affirmed the dismissal of this claim. Id. at 2a-4a. The court held that "the officers who handled [petitioner's] property fall within the [detention of goods] exception found in 28 U.S.C. § 2680(c)" and that the district court properly dismissed petitioner's FTCA claim "for want of subject matter jurisdiction." Id. at 4a-5a. In so holding, the court followed its prior decision in Schlaebitz v. United States Department of Justice, 924 F.2d 193, 195 (CA11 1991) (per curiam), in which the court held that United States Marshals, who were allegedly negligent in releasing a

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vacated the dismissal of and remanded the claims for further proceedings. Id. at 5a-7a. These claims will not be before this Court if certiorari is granted. Nor will they affect the issue before the Court or be affected by any decision on the question presented. As explained infra (at 25-26), this is a case where the interlocutory status of petitioner's other claims should have no bearing on this Court's decision whether to grant certiorari.

parolee's luggage to a third party, were "law-enforcement officers" under Section 2680(c) and consequently immune. Id. at 4a. In that case, the Eleventh Circuit expressly refused to "construe the phrase 'or any other law enforcement officer' as supplementing the tax and customs context of the exception," such that the exception would be limited to "other officials assisting the customs or tax collection." Schlaebitz, 924 F.2d at 194. Instead, the court found persuasive the holdings of other courts of appeals - holdings with which four courts of appeals now disagree - that the term "'other law enforcement officer' may include officers in other agencies performing their proper duties" that involve detaining, storing, or handling a person's property even if there is no nexus to customs or tax enforcement. Id. at 194-95 (citing cases involving the Immigration and Naturalization Service (INS), the Drug Enforcement Agency (DEA), the United States Department of Agriculture (USDA), and the United States Marshals and Federal Bureau of Investigation (FBI)).

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for a writ of certiorari and decide whether the term "other law enforcement officer" in 28 U.S.C. 2680(c) is a narrow exception defined by its specific context and extending to

only the detention of property by officers acting in tax, excise, and customs capacities or, instead, a broad exception that preserves sovereign immunity for claims arising out of the detention of property by all federal law enforcement officers acting in any capacity. As at least six courts of appeals have explicitly acknowledged, the circuits are divided on this very question. See Andrews v. United States, 441 F.3d 220, 227-28 (CA4 2006); Bramwell v. United States Bureau of Prisons, 348 F.3d 804, 808 (CA9 2003), cert. denied, 543 U.S. 811 (2004); Ortloff v. United States, 335 F.3d 652, 659-60 (CA7 2003), cert. denied, 540 U.S. 1225 (2004); United States v. Bein, 214 F.3d 408, 415 (CA3 2000), cert. denied, 534 U.S. 943 (2001); Bazuaye v. United States, 83 F.3d 482, 483 (CADC 1996); Kurinsky v. United States, 33 F.3d 594, 598 (CA6 1994), cert. denied, 514 U.S. 1082 (1995).[6] This division, which now involves

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[6] Commentators have likewise recognized the existence of this conflict. See, e.g., Donald T. Kramer, Construction and Application of Federal Tort Claims Act (FTCA) Exception in 28 U.S.C.A. § 2680(c), Concerning Claims Arising in Respect of Assessment or Collection of Any Tax or Customs Duty, or Detention of Goods or Merchandise by Any Officer of Customs or Excise or Any Other Law Enforcement Officer, 173 A.L.R. Fed. 465 §§ 7a-17 (2001 & 2006 Supp.); Sarah Lahlou-Amine, Comment, The Improper Expansion of Law Enforcement Officers' Immunity Under the Federal Tort Claims Act Detention of Property Provision: Why Immunity Should Not Extend to Bureau of Prisons Officials, 35 Stetson L. Rev. 559, 560, 570-85 (2006).

ten of the thirteen circuits, shows no signs of resolving itself, as it has existed for over a dozen years and continues to widen notwithstanding Congress' modest alterations to Section 2680(c) in 2000.[7] See supra note 2. Resolution of this conflict is warranted in view of the critical interests involved in FTCA litigation, the recurring nature of the question presented, and the need to ensure the FTCA's uniform application.

Over the last four years, the United States repeatedly has asked the Court to delay consideration of the question presented (and the Court has agreed) despite the question's recurring nature and importance because, according to the United States, no circuit adopting the narrow construction of Section 2680(c) (the minority view that petitioner advances and rejected below) had interpreted the statute as amended by CAFRA in 2000. Recently, however, two circuits have explicitly adopted the narrow interpretation of the statute and, in doing so, expressly rejected the United States' argument that the 2000 CAFRA amendments are in any way relevant to the question presented. Accordingly, there is no need to defer review again, and because this case is

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[7] The current version of the statute governs the question presented, as the conduct underlying this dispute post-dates CAFRA's August 23, 2000, effective date. See CAFRA § 21, 114 Stat. at 225.

an appropriate vehicle with which to address the question presented, the Court should do so now.

A. The Circuits Are Intractably Divided Six-to-Four on Whether the Term "Other Law Enforcement Officer" in 28 U.S.C. 2680(c) Is Limited to Officers Acting in a Tax, Excise, or Customs Capacity

Section 2680(c) deprives federal courts of jurisdiction to consider "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." While the Court has interpreted Section 2680(c) to apply both to claims for damage to property caused by a detention itself and to claims for damage caused by the "negligent handling or storage" of property, the Court has expressly declined to decide "what kinds of 'law-enforcement officer[s],' other than customs officials, are covered by the exception." Kosak v. United States, 465 U.S. 848, 852 n.6 (1984). The courts of appeals are intractably divided six-to-four on that question.

Four courts of appeals have adopted the narrow interpretation of Section 2680(c) urged by petitioner. The Fourth, Sixth, Seventh and District of Columbia Circuits hold that the term "any other law enforcement officer" is

limited by its context in the statute and applies to only law enforcement officers acting in a customs or excise capacity. See Andrews, 441 F.3d at 224-227 (CA4) (rejecting argument that BOP officers are exempt); Kurinsky, 33 F.3d at 596-598 (CA6) (rejecting argument that FBI agents are exempt); Ortloff, 335 F.3d at 656-660 (CA7) (rejecting argument that BOP officers are exempt); Bazuaye, 83 F.3d at 483-86 (CADC) (rejecting argument that postal inspectors are exempt).

By contrast, the Fifth, Eighth, Ninth, Tenth, Eleventh, and Federal Circuits have endorsed a broad interpretation of Section 2680(c) and extended that exception to law enforcement officers other than those engaged in tax- or customs-related duties. See Halverson v. United States, 972 F.2d 654, 656 (CA5 1992) (per curiam) (INS agents exempt), cert. denied, 507 U.S. 925 (1993); Chapa v. United States Dep't of Justice, 339 F.3d 388, 390 (CA5 2003) (per curiam) (BOP officers exempt); Cheney v. United States, 972 F.2d 247, 248 (CA8 1992) (per curiam) (federal drug enforcement task force agents exempt); United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 397 (CA9 1979) (Federal Aviation Administration (FAA) agents

exempt);[8] Bramwell, 348 F.3d at 806-07 (CA9) (BOP officers exempt); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1491 (CA10) (USDA inspectors exempt), cert. denied, 469 U.S. 825 (1984); Hatten v. White, 275 F.3d 1208, 1210 (CA10 2002) (BOP officers exempt); Schlaebitz, 924 F.2d at 195 (CA11) (United States Marshals and the United States Parole Commission exempt); Ysasi v. Rivkind, 856 F.2d 1520, 1525 (CAFC 1988) (United States Border Patrol agents exempt).[9]

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[8] But see A-Mark, Inc. v. United States Secret Service, 593 F.2d 849, 851 (CA9 1978) (Tang, J., concurring) (arguing "that § 2680(c) should be limited to detentions of goods by law-enforcement officers acting in a customs or tax capacity.").

[9] Of the thirteen circuits, only three (the First, Second, and Third Circuits) have not reached the question presented. Although the Second Circuit's decision in Formula One Motors, Ltd. v. United States, 777 F.2d 822 (1985), and the Third Circuit's decision in Bein are cited frequently by other courts as having held that Section 2680(c) should apply broadly to the activities of all law enforcement officers regardless whether there is a nexus to tax or customs activities, neither court so held. The Second Circuit stated expressly that it was not "determining whether the exemption would apply to searches by law enforcement officers with no relationship to the customs or excise functions." Formula One, 777 F.2d at 823-34; but see id. at 825 (Oakes, J., concurring) (arguing that "those cases applying the exception to law enforcement officers acting out of the excise/customs context to be wrongly decided" and citing the Ninth Circuit's decision in Lockheed as an example of cases wrongly decided). The Third Circuit in Bein, 214 F.3d at 415-16, merely noted that several other courts had interpreted Section 2680(c)'s law enforcement official phrase broadly and then used this observation in dicta to buttress its decision that a

B. The Conflict Among the Circuits Is Untenable

As the United States has repeatedly acknowledged, both the FTCA generally[10] and the exceptions contained in Section 2680 are important.[11] The Section 2680 exceptions mark "'the boundary between Congress' willingness to impose tort liability upon the United States,'" Molzof v. United States, 502 U.S. 301, 311 (1992) (quoting United States v. Varig Airlines, 467 U.S. 797, 808 (1984)), so as to "avoid injustice to those having meritorious claims hitherto barred by sovereign immunity," United States v. Muniz, 374

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plaintiff could not recover damages for negligent handling or loss of property by FBI agents under Federal Rule Criminal Procedure 41(e).

[10] See U.S. Cert. Pet. at 20, Will v. Hallock, 126 S. Ct. 952 (No. 04-1332) ("This Court should grant review to correct the court of appeals' erroneous limitation of this important federal statute."); U.S. Cert. Pet. at 8, United States v. Olson, 546 U.S. 43 (No. 04-759) ("Review by this Court is warranted to * * * address an important and recurring issue that is basic to Congress's limited waiver of sovereign immunity for tort claims based on conduct of federal employees acting within the scope of their employment.")

[11] See, e.g., U.S. Merits Br. at 11, Molzof v. United States, 502 U.S. 301 (No. 90-838) (acknowledging that Section 2680(a) - the so-called discretionary function exception - is an "important exception"); U.S. Cert. Br. at 4, Sheridan v. United States, 487 U.S. 392 (No. 87-626) (acquiescing to review "because the petition presents an important issue" relating to the proper construction of Section 2680(h), which excepts "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights").

U.S. 150, 154 (1963), and the "protect[ion of] certain important governmental functions and prerogatives from disruption * * * 'that would seriously handicap efficient government operation,'" Molzof, 502 U.S. at 311 (quoting Muniz, 374 U.S. at 163).

The deep and long-standing circuit split over the question presented is particularly troubling because of the frequency with which the question recurs, the broad range of claims to which it applies, and the fact that the question is often outcome determinative of plaintiffs' FTCA property claims. In 2006 alone, the question presented was addressed in at least sixteen district court decisions available on Westlaw.[12] Of course, these sixteen library-

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[12] See Harding v. United States, No. 04-CV-255-HRW, 2006 WL 3193377, at *4 (E.D. Ky. Nov. 1, 2006); Mendez v. United States, No. 05-1716(NLH), 2006 WL 2990470, at *1-*2 (D.N.J. Oct. 19, 2006); Marlin v. Fontenot, No. CIV A 06-1017-LC, 2006 WL 3313743, at *2 (W.D. La. Oct. 4, 2006); Lester v. United States, No. 5:05-cv-153(DCB)(JCS), 2006 WL 2811249, at *2 (S.D. Miss. Sept. 28, 2006); Lawal v. United States, No. 06-10, 2006 WL 2714442, at *2-*3 (W.D. La. Aug. 9, 2006); Munoz v. Attorney for United States Executive Office, No. 4:03-CV-03-2293, 2006 WL 2246413, at *2 (M.D. Pa. Aug. 4, 2006); Stafford v. Brown, No. 2:05CV00178 SWW/HDY, 2006 WL 2091795, at *3 (E.D. Ark. July 25, 2006); Wynn v. Missouri Highway Patrol, No. 06-0203-CV-W-NKL, 2006 WL 1875411, at *2 (W.D. Mo. June 30, 2006); Gibson v. Sadowski, No. 04-242, 2006 WL 1785563, at *2 (W.D. Pa. June 26, 2006), on reconsideration, 2006 WL 3308442, at *1 (W.D. Pa. Oct 17, 2006); Turkmen v. Ashcroft, No. 02 CV 2307(JG), 2006 WL 1662663, at *52-*53 (E.D.N.Y. June 14, 2006); Solis-Alarcon v. United States, 432 F. Supp. 2d 236, 248-51

accessible decisions likely represent but a small fraction of the cases in which the question presented was addressed by district courts. See Margo Schlanger & Denise Liberman, Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse, 75 Mo. K.C. L. Rev. 155, 164-65 (2006) (reporting that "only a small percentage of cases have any library-accessible opinions at all" and that in 2004, only 8.7% of all district court "terminations" - decisions disposing of a case - were available on Westlaw).

The question presented also implicates a plaintiff's ability to seek redress for property offenses committed by all types of federal law enforcement officers,[13] and where

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(D.P.R. 2006); Bruscino v. Pugh, No. 02 CV 02362 LTB PAC, 2006 WL 980580, at *4 (D. Colo. Apr. 11, 2006); Turnbull v. United States, No. 1:05 CV 1818, 2006 WL 1453044, at *2-*3 (W.D. La. Apr. 4, 2006); Smith v. United States, No. Civ. 03-0932(RBK), 2006 WL 231663, at *2-*4 (D.N.J. Jan. 30, 2006); Kimball v. United States, No. Civ.A. 1:04CV188, 2006 WL 722144, at *1-*2 (E.D. Tex. Jan 23, 2006); Parrott v. United States, No. 2:03-CV-0026 RLYWGH, 2006 WL 146626, at *3-*4 (S.D. Ind. Jan. 19, 2006).

[13] Section 2680(c) has already been applied by the courts of appeals in cases involving:

- Border Patrol agents: Ysasi, 856 F.2d at 1525 (CAFC) (exempted)
- BOP officers: Andrews, 441 F.3d at 228 (CA4) (not exempted); Chapa, 339 F.3d at 390) (CA5) (exempted); Ortloff, 335 F.3d at 660 (CA7) (not exempted); Parmelee v. Carlson, 77 F.3d 486 (Table), 1996 WL 64701, at *1 (CA8 1996) (not exempted); Bramwell, 348

Section 2680(c) is applied, it operates as an absolute bar to suit, foreclosing permanently a plaintiff's opportunity to sue. See Frigard v. United States, 862 F.2d 201, 204 (CA9 1988) (per curiam) (noting that unlike an "[o]rdinar[y] * * * case dismissed for lack of subject matter jurisdiction * * * without prejudice so that a plaintiff may reassert his claims in a competent court," cases dismissed under one of the FTCA's exceptions must be

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F.3d at 807 (CA9) (exempted); Hatten, 275 F.3d at 1210 (CA10) (same); App., infra, 4a-5a (CA11) (same)

- DEA/Drug task-force agents: Peak v. United States, 972 F.2d 352 (Table), 1992 WL 182229, at * 1 (CA7 1992) (exempted); Cheney, 972 F.2d at 248 (CA8) (same); United States v. $149,345 United States Currency, 747 F.2d 1278, 1283 (CA9 1984) (same)
- FAA agents: Lockheed, 656 F.2d at 397 (CA9) (exempted)
- FBI agents: Kurinsky, 33 F.3d at 598 (CA6) (not exempted); O'Ferrell v. United States, 253 F.3d 1257, 1271 (CA11 2001) (exempted)
- FDA officials: United States v. 1500 Cases, More or Less, 249 F.2d 382, 384 (CA7 1957) (exempted), rejected as dicta by Ortloff, 335 F.3d at 657 n.5
- INS/Bureau of Citizenship and Immigration Services agents: Halverson, 972 F.2d at 656 (CA5) (exempted); Kyei v. Beebe, 121 Fed. Appx. 689, 691 & n.4 (CA9 2005) (same)
- Postal inspectors: Bazuaye, 83 F.3d at 486 (CADC) (not exempted)
- USDA inspectors: 2,116 Boxes of Boned Beef, 726 F.2d at 1491 (CA10)
- U.S. Marshals: Schlaebitz, 924 F.2d at 195 (CA11) (exempted)

For a comprehensive tabulation of cases - including district court decisions - applying Section 2680(c) to officers other than tax or customs officers, see Kramer, supra, §§ 7a-17.

dismissed with prejudice because "the bar of sovereign immunity is absolute [and] no other court has the power to hear the case"), cert. denied, 490 U.S. 1098 (1989). To this end, the Seventh Circuit observed in Ortloff, 335 F.3d at 659, that an overly broad reading of "any other law enforcement officer" could potentially render much of the FTCA's waiver of sovereign immunity meaningless because it "would swallow up Congress's waiver of immunity, given the potential number of federal law enforcement officials in our modern government's alphabet soup - i.e., the DEA, EPA, FBI, FDA, FTC, INS, OSHA, SEC, or USDA, to name a few."

Rather than allow the lower courts to continue to resolve inconsistently these many cases seeking redress for property torts committed by government officers working in such diverse capacities, the Court should promptly resolve the entrenched conflict among the circuits.

C. The Basis for the United States' Opposition to Past Petitions on the Question Presented Is No Longer Valid

Although this Court has denied review of the question presented seven times since 2003,[14] in none of those cases

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[14] See Rigsby v. United States, 543 U.S. 955 (2004); Corbeil v. United States, 543 U.S. 822 (2004); Bramwell, 543 U.S. at 811; Conrod v. Moore, 542 U.S. 905 (2004); Greer v. United States, 541 U.S. 1087 (2004); Ames v. Pontesso, 538 U.S. 1058 (2003); Miller v. United States, 538 U.S. 1036 (2003).

did the United States dispute the recurring nature or importance of the question presented. Nor did the United States dispute the longstanding split among the circuits.[15] Instead, the United States' argument against review of those cases was that CAFRA eliminated the deep and long-standing division among the courts of appeals on the reach of Section 2680(c) immunity. Specifically, the United States argued that the courts of appeals "holding that Section 2680(c) is limited to detentions by an officer acting in a tax, excise, or customs capacity all interpreted the version of Section 2680(c) in effect before Congress amended it" through CAFRA in 2000 and those courts may not "interpret the current version the same way,

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[15] See U.S. BIO at 5 n.3, Rigsby v. United States, 543 U.S. 955 (No. 03-11038) (hereinafter "Rigsby BIO"); U.S. BIO at 5-6, Corbeil v. United States, 543 U.S. 822 (No. 03-9719) (hereinafter "Corbeil BIO"); U.S. BIO at 5-7, Bramwell v. United States Bureau of Prisons, 543 U.S. 811 (No. 03-1519) (hereinafter "Bramwell BIO"); U.S. BIO at 8 n.6, Greer v. United States, 541 U.S. 1087 (No. 03-9002) (hereinafter "Greer BIO"); U.S. BIO at 6-7, Conrod v. Moore, 542 U.S. 905 (No. 03-8804) (hereinafter "Conrod BIO"); U.S. BIO at 5-7, Ames v. Pontesso, 538 U.S. 1058 (No. 02-8538) (hereinafter ("Ames BIO"); U.S. BIO at 5-7, Miller v. United States, 538 U.S. 1036 (No. 02-8505) (hereinafter ("Miller BIO").

because the two versions differ in respects that are relevant to the issue."[16]

The United States' suggestion that CAFRA superseded the courts of appeals' pre-CAFRA Section 2680(c) jurisprudence was misplaced then and would be even more misplaced now. Since this Court last denied review of the question presented in 2004, see Rigsby, 543 U.S. at 955, both courts of appeals urged by the United States to adopt the broad reading of Section 2680(c)'s "any law enforcement officer" phrase have not only refused to do so but also found CAFRA entirely irrelevant to the question presented. See Dahler v. United States, --- F.3d ---, 2007 WL 79697, at *2 (CA7 Jan. 12, 2007) (per curiam) ("[W]e conclude that the new language in § 2680(c) does not affect the meaning of the phrase 'any law enforcement officer.'"); Andrews, 441 F.3d at 226-27 ("The Government also contends that the amendment to § 2680(c) in [CAFRA] compels us to conclude that BOP officers are "law enforcement officer[s]" for purposes of § 2680(c). * * * We disagree.").

The Fourth Circuit in Andrews, 441 F.3d at 227-28, squarely rejected the United States' argument that interpreting "law enforcement officer" to encompass only

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[16] Corbeil BIO at 5-6; accord, Bramwell BIO at 6; see also Rigsby BIO at 5-6; Conrod BIO at 10-11; Greer BIO at 9; Ames BIO at 11-13; Miller BIO at 9.

those law enforcement officers acting in a tax or customs capacity would render the CAFRA amendments superfluous "because adequate remedies already existed for property damage claims arising from tax and customs enforcement." According to that court,

> [t]he remedy created by CAFRA is different from the historical remedy against customs and tax officers. To recover against the United States through the historical remedy, a plaintiff must show, inter alia, that the customs or tax officer acted without probable cause. The CAFRA remedy, however, has no such requirement. Instead, if a plaintiff satisfies CAFRA's four-part showing, he only need show that the customs or tax officer acted negligently.

Id. at 228 (comparing 28 U.S.C. 2006 with 28 U.S.C. 2680(c)).[17]

Consistent with this view, the Seventh Circuit in Dahler rejected the United States' invitation to overrule its prior decision in Ortloff, which had adopted the narrow construction of 2680(c)'s "other law enforcement officer" language under the pre-CAFRA version of the statute. Dahler, 2007 WL 79697 at *2 ("In Ortloff * * * we construed the version of § 2680(c) that existed before CAFRA's amendments."). The Seventh Circuit reasoned that "CAFRA

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[17] 28 U.S.C. 2006 provides that, in an action brought against a revenue or customs officer for negligent loss of goods, if it is established that the seizure was made with probable cause the judgment may not be executed against the individual officer but "shall be paid out of the proper appropriation by the Treasury."

merely ensures that § 2680(c) does not foreclose claims related to property that has been seized for forfeiture in the enumerated circumstances" and that "[t]he text of CAFRA says nothing about the type of activities in which law enforcement officers must be engaged in order for § 2680(c) to initially apply and thus immunize the government from suit."[18] Ibid.

Even if the United States had been correct in its prior oppositions to certiorari that CAFRA created a jurisprudential tabula rasa on Section 2680(c)'s proper construction, review would still be warranted now over the proper interpretation of the current (i.e., post-CAFRA) version of the statute. Since CAFRA's enactment, six courts of appeals have addressed the question presented under the current version of Section 2680(c) and aligned themselves in a four-to-two split. Indeed, as the United States itself acknowledged in Corbeil and Bramwell, four courts of appeals "ha[ve] addressed the issue under the

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[18] These courts likewise found CAFRA's legislative history unhelpful to the United States' position. The Fourth Circuit observed that the phrase "any other law enforcement officer" is "original" to Section 2680(c) and, therefore, "it is the intent of the Congress that enacted the original subsection that controls." Andrews, 441 F.3d at 227 n.8. The Seventh Circuit, which did analyze CAFRA's legislative history, found that "Congress intended the amendment to apply only to forfeitures - not to every detention - of property." Dahler, 2007 WL 79697 at *2.

current [post-CAFRA] version of Section 2680(c) [and] concluded * * * that it extends to detentions by a law enforcement officer acting outside the tax, excise, and customs contexts."[19] Corbeil BIO at 6; Bramwell BIO at 6. The Fourth Circuit and the Seventh Circuit subsequently rejected this line of cases, thereby resolving any doubt that the courts of appeals are presently divided. See Dahler, 2007 WL 797697 at *2 (rejecting Chapa and Bramwell); Andrews, 441 F.3d at 228 (rejecting, inter alia, Chapa, Bramwell, and Hatten).

This conflict will not be resolved absent this Court's intervention, as evidenced by the fact that the two most recent published court of appeals decisions on the issue – by the Fourth Circuit in Andrews and the Seventh Circuit in

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[19] The Fifth Circuit in Chapa, 339 F.3d at 390, reaffirmed its pre-CAFRA decision in Halverson, 972 F.2d at 656, extending Section 2680(c) to law enforcement officers acting outside the tax, excise, and customs contexts and applied it to the current version of the statute. Likewise the Ninth Circuit in Bramwell, 348 F.3d at 807, reaffirmed its pre-CAFRA decision in Lockheed, 656 F.2d at 397, and applied it to the current version of Section 2680(c). In endorsing the broader reading of the current version of Section 2680(c), the Tenth Circuit's post-CAFRA decision in Hatten, 275 F.3d at 1210, relied on the Southern District of Mississippi's decision in Crawford v. United States Dep't of Justice, 123 F. Supp. 2d 1012, 1013 (S.D. Miss. 2000), which had itself relied on the current version of the statute. Finally, the Eleventh Circuit in O'Ferrell, 253 F.3d at 1271, reaffirmed its pre-CAFRA decision in Schlaebitz, 924 F.2d at 194, and applied it to the current version of Section 2680(c).

Dahler - have rejected the majority view and widened the conflict among the circuits. Nor will this Court's decisional process be aided by allowing the issue to percolate further in the courts of appeals. Contrast McCray v. New York, 461 U.S. 961, 962-63 (1983) (Stevens, J., respecting denial of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow" an issue to "receive[] further study" in other courts "before it is addressed by this Court."). The issue has now been vetted by ten of the thirteen courts of appeals (including six post-CAFRA) with multiple thorough decisions explicating both sides of the jurisprudential debate. Compare, e.g., Chapa, 339 F.3d at 390-91, and Bramwell, 348 F.3d at 806-07, with, e.g., Andrews, 441 F.3d at 223-28, and Dahler, 2007 WL 79697 at *1-*3. The only thing that will result from delaying consideration of this issue is waste of litigants' and lower courts' resources as the courts of appeals continue to apply their settled law in divergent ways and as litigants battle for victories in the three circuits where the question presented remains open.[20]

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[20] In the last year, the United States has filed at least two Federal Rule of Civil Procedure 59 motions for reconsideration of district court decisions adopting the narrow construction of Section 2680(c). Both of those motions urged reconsideration in light of intervening non-binding precedents because the question presented was not

D. This Case Is an Appropriate Vehicle to Resolve the Conflict Among the Circuits.

In the decision below, the court of appeals conclusively held that petitioner was not entitled to pursue his FTCA claim against the United States because the BOP officers who handled his property were "law enforcement officers" within the meaning of the Section 2680(c) exception.[21] App., infra, 4a-5a. Although petitioner did assert additional claims, the pending status of which render this petition interlocutory,[22] these additional

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resolved by controlling circuit precedent. See U.S. Mot. for Reconsideration at 2-6, Mendez v. United States, No. 05-1716(NLH) (D.N.J. Nov. 2, 2006) (hereinafter "Mendez Reconsideration Mot."); U.S. Mot. for Reconsideration at 2-6, Gibson v. Sadowski, No. 04-242 (W.D. Pa. July 11, 2006).

[21] The United States cannot possibly dispute that the question presented was squarely resolved below. Indeed, the United States has already relied on the court of appeals' decision in this case as persuasive authority on the question presented in another case. See, e.g., Mendez Reconsideration Mot. at 1, 3.

[22] Petitioner is mindful that the interlocutory posture of a case "of itself alone furnishe[s] sufficient ground for the denial" of a petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see also Virginia Military Inst. v. United States, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition). But interlocutory status is by no means fatal to review of a recurring and important question squarely answered below. Just three weeks ago, the Court granted review in BCI Coca-Cola Bottling Co. of Los Angeles v. E.E.O.C., --- S. Ct. ---, 2007 WL 30546, 75 U.S.L.W. 3106 (U.S. Jan. 5, 2007), notwithstanding the United States' argument that the case "would constitute a poor vehicle for addressing any conflict because it arises in an interlocutory posture,"

claims will not affect the issues before the Court or be affected by any decision of the Court on the question presented. Nothing about the posture of - or the record in - this case would impede the Court from reaching and resolving that frequently recurring and important question, and only this Court can reinstate petitioner's right to seek relief under the FTCA. Put simply, the interlocutory status of this case does not militate against a grant of certiorari.[23]

U.S. BIO at 12-13, BCI Coca-Cola Bottling Co. of Los Angeles v. E.E.O.C., (No. 06-341).

[23] The United States frequently recommends that the Court grant - and the Court often does grant - petitions seeking review of interlocutory decisions presenting questions of law not likely to be sharpened by further proceedings. See, e.g., U.S. Cert. Br. at 10, Osborn v. Haley, 126 S. Ct. 2017 (No. 05-593) (review warranted "on balance" despite interlocutory posture); U.S. Cert. Br. as Amicus Curiae at 17-18, Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (No. 92-854) (review warranted despite interlocutory posture because "[t]he issue of law presented in this case is not likely to be sharpened by factual elaboration at trial"); U.S. Cert. Br. as Amicus Curiae at 17 n.23, Air Line Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65 (No. 89-1493) (review warranted despite interlocutory posture because "the court of appeals has finally determined the applicable legal standard"). Because the court of appeals conclusively resolved petitioner's FTCA claim, the question presented cannot possibly be sharpened by further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 2007

(14)

(6)

May 8, 2007

No. 06-9130

IN THE SUPREME COURT OF THE UNITED STATES

ABDUS-SHAHID M.S. ALI, PETITIONER

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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May 2007

IN THE SUPREME COURT OF THE UNITED STATES

No. 06-9130

ABDUS-SHAHID M.S. ALI, PETITIONER

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The United States has acquiesced to the Court granting review of this case. It agrees (1) that "there is a conflict in the circuits" over the question presented; (2) that the conflict "is highly unlikely to be resolved without this Court's intervention;" (3) that the question presented "is a recurring one of importance;"[1] and (4) that the court of appeals' "definitive" resolution of the

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[1] The United States has conceded elsewhere that the question presented is "of exceptional importance." U.S. Pet. for Rhr'g En Banc at 1, Dahler v. United States, 473 F.3d 769 (CA7 2007) (No. 05-4782) (emphasis added); accord, U.S. Pet. for Rhr'g & Rhr'g En Banc at 2, Andrews v. United States, 441 F.3d 220 (CA4 2006) (No. 04-7269). As the United States acknowledges, both the Fourth and Seventh Circuits denied these petitions for rehearing en banc. U.S. Br. 9.

question "weighs in favor of granting review" "despite the interlocutory posture of this case." U.S. Br. 6, 9, 10, 12, 13.

Although it has acquiesced to review, the United States nonetheless posits that "other opportunities for review that do not involve interlocutory decisions are likely to arise in short order" and that "the Court may prefer to await a case that does not arise in an interlocutory posture." Id. at 13. Of course, the United States does not recommend such a course of action, and petitioner anticipates that the Court will grant the petition in any event. In an abundance of caution, however, petitioner submits this brief reply to dispute both (a) the existence of any reason to "await a case that does not arise in an interlocutory posture," and (b) the accuracy of the assertion that "other opportunities for review that do not involve interlocutory decisions are likely to arise in short order."

It is axiomatic that "the interlocutory status of [a] case may be no impediment to certiorari, where the opinion of the court below has decided an important issue, otherwise worthy of review." Robert L. Stern et al., Supreme Court Practice § 4.18, at 260 (8th ed. 2002). In fact, of the 71 signed opinions that the Court will have

issued this Term, 20 (or over 28%) will have reviewed interlocutory judgments of the courts of appeals.[2]

There is no dispute that this case presents an important and recurring issue "otherwise worthy of review." See U.S Br. 10 (acknowledging that "[r]estoring uniformity and stability to the interpretation and operation of a federal law is an established basis for this Court * * * to grant the petition"); see also Pet. 10 ("Resolution of this conflict [among the circuits] is warranted in view of the critical interests involved in FTCA litigation, the

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[2] Bell Atlantic Corp. v. Twombly, No. 05-1126 (argued Nov. 27, 2006); Claiborne v. United States, No. 06-5618 (argued Feb. 20, 2007); Credit Suisse First Boston Ltd. v. Billing, No. 05-1157 (argued Mar. 27, 2007); Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc., 127 S. Ct. 1513 (2007); Hein v. Freedom from Religion Found., Inc., No. 06-157 (argued Feb. 28, 2007); KSR Int'l Co. v. Teleflex Inc., --- S. Ct. ---, 2007 WL 1237837 (April 30, 2007); Long Island Care at Home, Ltd. v. Coke, No. 06-593 (argued April 16, 2007); Morse v. Frederick, No. 06-278 (argued March 19, 2007); Office of Senator Mark Dayton v. Hansen, No. 06-618 (argued April 24, 2007); Osborn v. Haley, 127 S. Ct. 881 (2007); Permanent Mission of India to the United Nations v. City of New York, No. 06-134 (argued April 24, 2007); Safeco Ins. Co. of Am. v. Burr, No. 06-84 (argued Jan. 16, 2007); Schriro v. Landrigan, No. 05-1575 (argued Jan. 9, 2007); Scott v. Harris, --- S. Ct. ---, 2007 WL 1237851 (April 30, 2007); Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 127 S. Ct. 1184 (2007); Tellabs, Inc. v. Makor Issues & Rights, Ltd., No. 06-484 (argued March 28, 2007); United States v. Atlantic Research Corp., No. 06-562 (argued April 23, 2007); Watson v. Phillip Morris Companies, Inc., No. 05-1284 (argued April 25, 2007); Wilkie v. Robbins, No. 06-219 (argued March 19, 2007); Winkelman v. Parma City Sch. Dist., No. 05-983 (argued Feb. 27, 2007).

recurring nature of the question presented, and the need to ensure the FTCA's uniform application."). Moreover, the concerns typically associated with interlocutory petitions - e.g., that the issue of law presented will be either sharpened by factual elaboration or rendered moot through further proceedings - are not present here. The parties agree that "whatever the ultimate disposition" of petitioner's other claims presently pending on remand before the district court, that disposition "will not affect petitioner's FTCA claim, which the court of appeals has definitively rejected as a matter of law." U.S. Br. 12-13; see also Pet. 25-26 (noting that petitioner's other claims "will not affect the issues before the Court").

Although it agrees that the interlocutory posture of this case presents no obstacle to resolution of the question presented, the United States suggests that the Court may prefer to await another case because "other opportunities for review that do not involve interlocutory decisions are likely to arise in short order." U.S. Br. 13. The accuracy of this speculative premise, however, is far from clear.

Unlike district courts, which confront the question presented with remarkable frequency,[3] the courts of appeals confronted the question only five times between January 1, 2006, and the filing of this reply.[4] See Pet. App. 1a-7a;

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[3] Between January 1, 2006, and the filing of this reply, district courts addressed the question presented in twenty-four decisions available on Westlaw (and likely many more that are not library-accessible, see Pet. 15). See Cyrus v. Doe, No. 3:06-CV-01697, 2007 WL 916300, at *5 (M.D. Pa. Mar. 21, 2007); Webber v. Ramos, No. EP-04-CA-426-KC, 2007 WL 1039214, at *4 (W.D. Tex. Mar. 21, 2007); Gordon v. United States, No. 2:05-cv-1011, 2007 WL 710231, at *2-*3 (S.D. Ohio Mar. 6, 2007); VanZandt v. Fish & Wildlife Serv., No. 05-CV-6093 CJS, 2007 WL 670959, at *4-*6 (W.D.N.Y. Feb. 28, 2007); Amadi v. Robinson, No. 2:06-cv-01833-JTT, 2007 WL 958148, at *5 (W.D. La. Feb. 16, 2007); Futch v. Drug Enforcement Admin., No. CV406-238, 2007 WL 496631, at *1 & n.2 (S.D. Ga. Feb. 12, 2007); Cross v. United States, No. 5:06-cv-36-DCB-MTP, 2007 WL 763926, at *1-*2 (S.D. Miss. Feb. 12, 2007); Macia v. United States, No. 3:06cv185/RV/MD, 2007 WL 187480, at *5 (N.D. Fla. Jan. 22, 2007); Pet. 15-16 n.12 (collecting sixteen examples from 2006).

[4] One likely explanation for this disparity is the fact that each of the ten circuits to have addressed the issue (save the Fourth Circuit) solidified its respective position years ago. Compare United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 397 (CA9 1979); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1491 (CA10), cert. denied, 469 U.S. 825 (1984); Ysasi v. Rivkind, 856 F.2d 1520, 1525 (CAFC 1988); Schlaebitz v. Department of Justice, 924 F.2d 193, 195 (CA11 1991) (per curiam); Cheney v. United States, 972 F.2d 247, 248 (CA8 1992) (per curiam); Halverson v. United States, 972 F.2d 654, 656 (CA5 1992) (per curiam), cert. denied, 507 U.S. 925 (1993); Kurinsky v. United States, 33 F.3d 594, 598 (CA6 1994), cert. denied, 514 U.S. 1082 (1995); Bazuaye v. United States, 83 F.3d 482, 483 (CADC 1996); Ortloff v. United States, 335 F.3d 652, 659-60 (CA7 2003), cert. denied, 540 U.S. 1225 (2004), with Andrews, supra. Accordingly, district courts within those circuits can resolve the issue

Bruscino v. Pugh, No. 06-1182, 2007 WL 1140361, at *1-*2 (CA10 Apr. 18, 2007); Robinson-Bey v. Feketee, No. 06-3326, 2007 WL 625713, at *3 (CA10 Mar. 2, 2007); Dahler v. United States, 473 F.3d 769, 771-72 (CA7 2007); Andrews v. United States, 441 F.3d 220, 222-28 (CA4 2006). Three of those five decisions yielded interlocutory judgments,[5] and this case is the only one in which a petition for a writ of certiorari has been filed. Additionally, until the petition in this case was filed, the Court's review of the question presented had not been sought in over three years, despite the question's recurring nature. See Bramwell v. Bureau of Prisons, 543 U.S. 811 (2004) (No. 03-1519) (pet. filed May 5, 2004). Finally, because the issue recurs most frequently in cases brought by pro se prisoners who often lack legal training and resources, there is no guarantee that the relevant legal arguments will be properly preserved in the court of appeals[6] or that the issue will be properly presented in a petition for a writ of certiorari.[7]

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with citation to settled circuit precedent, which would indicate to the losing parties that seeking appellate review would likely be futile.

[5] See Pet. App. 1a-7a; Dahler, supra; Andrews, supra.

[6] For example, in the presently-pending Second Circuit case, the "plaintiff does not address the question at issue in this case: whether 28 U.S.C. § 2680(c) applies to detentions of goods by all law enforcement officers and

In sum, if past is prologue, it may be three more years - despite the recurring nature of the question presented - before the question is presented to the Court in a non-interlocutory petition prepared by counsel. While it is debatable whether three years qualifies as "short order," three years is too long to leave the important, recurring, and divisive question unresolved by this Court - particularly since the interlocutory posture of this case presents no obstacle to the question's resolution.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

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thus deprives the district court of jurisdiction over plaintiff's claims." U.S. Br. at 39, ABC v. DEF, No. 06-1362 (CA2 filed Nov. 3, 2006).

[7] As noted in the petition, this Court denied review of the question presented a total of seven times in 2003 and 2004. See Rigsby v. United States, 543 U.S. 955 (2004) (No. 03-11038) (pet. filed April 22, 2004); Corbeil v. United States, 543 U.S. 822 (2004) (No. 03-9719) (pet. filed Apr. 2, 2004); Bramwell, supra; Conrod v. Moore, 542 U.S. 905 (2004) (No. 03-8804) (pet. filed Jan. 9, 2004); Greer v. United States, 541 U.S. 1087 (2004) (No. 03-9002) (pet. filed Dec. 29, 2003); Ames v. Pontesso, 538 U.S. 1058 (2003) (No. 02-8538) (pet. filed Dec. 16, 2002); Miller v. United States, 538 U.S. 1036 (2003) (No. 02-8505) (pet. filed Jan. 14, 2003). Of those seven cases, only the petition in Bramwell was filed by counsel.

Respectfully submitted.

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May 2007

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(7)

Supreme Court, U.S.
FILED
JUL 31 2007
OFFICE OF THE CLERK

No. 06-9130

In the Supreme Court of the United States

ABDUS-SHAHID M.S. ALI, PETITIONER,

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: JANUARY [illegible]
CERTIORARI GRANTED: MAY 29, 2007

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SUPREME COURT, U.S.

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RELEVANT DOCKET ENTRIES

United States District Court
Northern District of Georgia (Atlanta)
1:04-cv-02986-JFK

Abdus-Shahid M.S. Ali v.
Federal Bureau of Prisons, et al.

10/12/04	1	COMPLAINT filed , filed by Abdus-Shahid M.S. Ali.(ldp) (Entered: 10/15/2004)

* * *

07/05/05	19	MOTION to Dismiss with Brief In Support by Federal Bureau of Prisons, Lippin, R. Wiely, Qun'anis, Southeast Regional Director. (Attachments: # 1 Exhibit 1 pages 1-3# 2 Exhibit 2 pages 1-6# 3 Exhibit 3 pages 1-6)(McClain, Stephen) (Entered: 07/05/2005)
07/11/05	20	MOTION for leave to Amend 1 Complaint by Abdus-Shahid M.S. Ali. (Attachments: # 1 Proposed Amended Complaint)(fmm) (Entered: 07/12/2005)
07/14/05	21	MOTION to Dismiss *Renewed by Defendants'* with Brief In Support by Federal Bureau of Prisons, Lippin, R. Wiely, Qun'anis, Southeast Regional Director. (McClain, Stephen) (Entered: 07/14/2005)
07/25/05	22	RESPONSE in Opposition re 19 MOTION to Dismiss filed by Abdus-Shahid M.S. Ali. (fmm) (Entered: 07/27/2005)

* * *

07/27/05		Submission of 19 MOTION to Dismiss, 20 MOTION to Amend 1 Complaint, 21 MOTION to Dismiss *Renewed by Defendants'*, submitted to District Judge Orinda D. Evans. (fmm) (Entered: 07/27/2005)

* * *

08/10/05	25	ORDER granting 24 Motion for Relief from Local Rules 16.1 and 26.1 until 14 days from the date of the ruling on the pending motion to dismiss, granting 20 Motion to Amend and clerk is directed to file the proposed amended complaint as of the date of this order, denying 23 Motion to Appoint Counsel. Signed by Judge Orinda D. Evans on 8/9/05. (fmm) (Entered: 08/10/2005)
08/10/05	26	AMENDED COMPLAINT against all defendants and adding defendant United States filed by Abdus-Shahid M.S. Ali.(fmm) Please visit our website at http://www.gand.uscourts.gov to obtain Pretrial Instructions. (Entered: 08/10/2005)

* * *

01/27/06	28	ORDER granting 21 Renewed Motion to Dismiss and dismissing with prejudice plaintiff's claim under the FTCA and dismissing without prejudice plaintiff's other

claims under the Religious Freedom Act, Institutionalized Persons Act and Bivens. Signed by Judge Orinda D. Evans on 1/26/06. (fmm) (Entered: 01/27/2006)

01/27/06 29 CLERK'S JUDGMENT entered dismissing with prejudice plaintiff's claim under the FTCA and dismissing without prejudice plaintiff's other claims under the Religious Freedom Act, Institutionalized Persons Act and Bivens. (fmm) --Please refer to http://www.ca11.uscourts.gov to obtain an appeals jurisdiction checklist-- (Entered: 01/27/2006)

02/01/06 Civil Case Terminated. (fmm) (Entered: 02/03/2006)

02/27/06 31 NOTICE OF APPEAL as to 28 Order on Motion to Dismiss,, 29 Clerk's Judgment, by Abdus-Shahid M.S. Ali. Transcript Order Form due on 3/13/2006.Appeal fee letter and IFP forms mailed to plaintiff. (fem) (Entered: 03/01/2006)

* * *

03/09/06 33 USCA Acknowledgment of 31 Notice of Appeal filed by Abdus-Shahid M.S. Ali,. Case Appealed to USCA Case Number 06-11468-A (fem) (Entered: 03/13/2006)

United States Court of Appeals
for the Eleventh Circuit
06-11468-AA

Abdus-Shahid M.S. Ali v.
Federal Bureau of Prisons, et al.

* * *

03/07/06	DKT2 (Docketing Notice) issued. To:Ali, Abdus-shahid; c:Luther D. Thomas; c:Stephen H. McClain; c:Thurbert Baker

* * *

05/08/06	Appellant Brief Filed: (ProSe)

* * *

06/13/06	Appellee Brief Filed: (Atty: Stephen H. McClain)

* * *

10/19/06	Judgment Entered
10/19/06	OPIN1 (Notice of issuance of opinion) issued. c:Ali, Abdus-Shahid M.S.; c:Orinda D. Evans; c:Stephen H. McClain
10/19/06	Opinion Issued AFFIRMED in pt/VACATED in pt/REMANDED.

* * *

12/14/06	CASE CLOSED-Mandate Issued
12/14/06	Mandate Issued

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 1:04-CV-02986-ODE

[Filed August 10, 2005]

ABDUS-SHAHID M.S. ALI, Pro Se.	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES	)
FEDERAL BUREAU OF PRISONS,	)
HARLEY LAPPIN, Director F.B.O.P.	)
R. WILEY, FOEMER-WARDEN-USP-ATLATA	)
DANIEL QUINONES, R & D-OIC-Atlanta	)
Defendants,	)
	)

JUDGE: ORINDA D. EVANS,
UNITED STATES DISTRICT JUDGE
FIRST: AMENDED COMPLAINT:
JURY TRIAL DEMAND: GENERAL–DEFENDANTS
JUDGE TRIAL DEMAND AGAINST U.S.

CIVIL RIGHTS COMPLAINT FOR VIOLATIONS
OF CONSTITUTIONAL AND STATUTORY
RIGHTS UNDER THE PROVISIONS OF
Title 28 U.S.C. § 1331, §1343, §1346, §1367
& Title 42 U.S.C. § 2000bb-1, & 2000cc-1

Comes now the above cited Plaintiff, being deposed according to law and address this Court under the penalty of perjury as follows:

PRELIMINARY STATEMENT

[1] That this cause of action and redress is brought by the Plaintiff for damages and injunctional relief and what other actions that the Court deems necessary and proper...for the Defendants' callous and the negligent-indifference to the lost, thief, looted, confiscated or destoried/destruction of the Plaintiff's personal and religious property while it was in their care and trust, during the period it was left in the R & D, and while the Plaintiff had been transfered from the USP-Atlanta, Ga. to the USP-Big Sandy, at Inez, Kentucky.

[2] That Plaintiff is a former-inmate of the DCDC(hereinafter for District of Columbia Department of Corrections), having been transfered into the FBOP(hereinafter-for Federal Bureau Of Prisons), at USP-Atlana, Ga. pursuant to an act of Congress that closed the Lorton,Va.-DCDC-Central Facilities about October 1st,2001. Plaintiff arrived at USP-Atlanta, Ga. on Gugust 1st,2001.

[3] That Plaintiff having filed and exhausted his administrative remedies, for the return or restitution of his missing property, pursuant to the FTCA(hereihafter for Federal Tort Claims Act), (28U.S.C. §1346, §2671), to no avail! Therefore having been given leave to proceed wtih legal action in the Courts as of August 11th, 2004 Plaintiff filed the instant suit seeking fust redress for the lost property.

[4] Plaintiff now sues the United States /FBOP and said other Defendants in both their Official and individual capacities under supplimental jurisdictionas. The complaint is against the United States, the Federal Bureau of Prisons and current and and former federal officials employeed by the FBOP at USP-Atlanta, Ga. for the violation of the Plaintiff's property rights under the First, Fourth and Fifth Amendments to the Constitution, and Statutory violations also. The Defendants clandestinedly looted and/or confiscated unjustifiablly said personal, legal and religious property. It was done in a discriminational, and deliberate malice, negligence and indifference. The Plaintiff thus, seeks damages from the United States and /or Damages and punitive damagesand injunctive relief from the FBOP and the Defendants cited herein under 28 U.S.C. §1331, §1343, §1346(b) and §1367; ALSO 42 U.S.C. §2000bb-1 ("RFRA").(hereinafter-for-Religious Freedom Restoration Act); ans §2000cc1 ("RLUIFA"), (for the Religious Land use and Istitutionalized Persons Act), for rights to free exercise of religion, due process, and for protection from the said Establishment of a religion.

JURISDICTION STATEMENT

[5] That the Court has juridiction over the Plaintiff's Claims of the violations of his Federal Constitutional Rights under 28 U.S.C. § 1331, §1343, §1346(b) and 42 U.S.C. §2000bb-1 and §2000cc-1.

[6] That the Court have Supplimental Jurisdiction over the Plaintiff's Tort and Civil Rights Federal Claims under Title 28 U.S.C. §1367(a), Title 42U.S.C. §2000bb-1 and §2000cc-1.

[6] That Venue is proper under Title 28 U.S.C. § 1391(e).

PARTIES

[7] That Plaintiff, Abdus-Shahid M.S. Ali,Reg.#03201-000, and is housed at this time in the USP-Big Sandy, at Inez, Kentucky. He was returned back to USP-Big Sandy from the Federal Medical Center For Prisoners on April 27th, 2005. At all times relevant to this suit Plaintiff was domiciled in USP-Atlanta, Georgia from August 1st, 2001 until December 3rd, 2003.

[8] That Defendants United States, is the governing power of the United States of America. and acts under the color of Federal Law, rules, regulations, customs and Policy . . . Its is sued in its Official and Individual Capacity. Its' Chief Counsel is the U.S. Attorney General and its address location is Office of the Attorney General. of the U,S, at the U.S. Department Of Justice..10th and Constitution Avenue, N.W.in Washington, D.C. 20001

[9] That Defendant Federal Bureau of Prisons, is an official Agent/agency of the United and operate under the color of federal law,regulations, customs and policy. It operate over 105 federal facilities. Its' chief representative is the Director, Harley Lappin. Its is sued in both its Official and Individual Capacity. Its official address is 320 First Street, N.W. at Washington , D.C. 20534.

[10] Defendant Harley Lappin, is the Director of FBOP ans is employeed as such by the Federal Government. He is the Chilf Officer and policy maker of the FBOP. He was so employeed at all times relevant to this suit. His official address is at 320 First Street, N.W. Office

of the Director, at Washington, D.C. 20534 He is sued in both his Official

[11] That Defendant, R. Wiely, upon information and belief is the former-warden of USP-Atlanta, Ga. He is / was so employeed by the FBOP at all times relevant to this suit. He was the chilef policy officer in the USP-Atlanta. His was known official address was USP-Atlanta, Ga. 601 McDonough, Blvd., S.E. Atlanta, Ga. 30315. He is sued in both his said official and Individual Capacity.

[12] Daniel Quinones, R and D-OIC-USP-Atlanta, was the said "office In Charge"(hereinafter-OIC), of the receiving and Discharge (hereinafter-R & D), Unit for USP-Atlanta, Ga. He was employeed by the FBOP- at the USP-Atlanta, Ga. Facility. As such an employee he was present at all time relevant to this complaint, as the OIC of R & D. He was the direct person that accepted responsibility for the inventory and packaging of all Plaintiff's property and he labled the boxes and handled the shipping.He is sued in both his official and individual capacity. His official mailing address is USP-Atlanta, Ga...601 McDonough Blvd., S.E. Atlanta, Ga., z.c.-30315.

FaCTURAL-ALLEGATIONS STATEMENT

[13] That it is a fact that the Plaintifleft his property (personal, legal and religious),on December 2nd,2003. in the personal care of USP-Atlanta, in the hands of R & D Staff-OIC, D.Quinones.The Plaintiff had been callled to the R & D Unit at about 8:00 AM on December 2, 2003 to have his property inventoried and packaged up for transfer to the USP-Big Sandy, at Inez, Ky. The Plaintiff was to be transfered on 12/3/03.

[14] That the Plaintiff waited all morning to have his property inventoried and boxed-up for shipping...(this was the second time that the plaintiff had tried to get his property inventoried and packaged up for shipping to the new facility-USP-Big Sandy; On 11/28/03 the said Plaintiff had taken all his property to the R & D for inventory and packaging, but was told by officer D. QUINONES that I would have to take my property back to the cellhouse because he was working by his self and he only caaled us over to let us know the rules for property that could be transfered to the new facility, Thus he informed us to bring the property back to R & D on Monday or Tuesday then he sent for us.) Thus, the said Plaintiff was sent for on Tuesday, December 2, 2003 at about *:00AM.

[15] That Plaintiff waited half a day and was informed by Officer, D. Quinones, R & D-OIC, that he was working alone and that the way it was going he was not going to be able to get to inventory my property before it was time for him to go home. He said if you leave your property right there in the doorway of one of the R & D Unit property rooms he woul get to it in a day or so and that he would ship every thing in the two bags (green-army-duffal bags),in boxes and ship it all off to USP-Big Sandy because I was not there to mail anything home that couldn't go or be shipped. Thus the Plaintiff complied with the officers request. He closed up his duffal bads and put his combination locks on the bags andleft them in the property room. All the misted missing property was in the two bags

[16] That when the Plaintiff's property was given to him in USP-Big Sandy the misted missing property was not accounted for in the USP-Atlanta, Ga. inventory slip not

was it acknowledged as having been received by thr USP-Big Sandy R & D inventory slips.

[17] That Plaintiff's said missing property items can be provened as having been a part of his property and dated via., the USP-Atlanta canteen slips or the USP-Atlanta inventory slips from 8/20/01 (the date plaintiff's property from DCDC-Lorton, Va. was inventoried and givento the plaintiff in USP- Atlanta, Ga. Also the Plaintiff's DCDC-Lorton, Va. inventory slip for 8/1/01, the day he was transfered from the DCDC-Lorton, Va. Central Facility to the USP Attlanta, Ga.). All those slips will show owership of the missing property listed in this suit as Plaintiff's Exhibit No. two.

[18] Plaintiff is a Muslim and his religious faith is Al-Islam and his religious Holy Book is the Holy Qur'an. Thus his religious Book is sacred to him, and so is his prayer-rugs, and other religious lierature.

[20] That upon information and belief, adherents of the Islamic faith constitute a large minoroty of the total population in the FBOP and the State facilities.

[21] That the FBOP have rules and regulations thats been so developed for both religious and personal property that is allowed in the FBOP. Plaintiff affirms that his two Holy Qur'ans are missing from his property left in the care of officer Daniel Quinones in the R & D property Room-Unit.; and that he had owned them for 15 to, 20 years...they both were very dear to him. He brought them from DCDC-Lorton Va. on 8/1/01..when he transfered to the FBOP at USP-Atlanta, Ga. They were very dear to him...They were on his DCDC-Lorton, Va, inventory listing.

[22] That Muslims practicing traditional Al-Islam are required by the Islamic laws to adhere to certain religious-ritual. One such ritual of central importance is prayer five times a day, at appointed times. Thus, we are permitted to own prayer caps (kuffies), prayer rugs, and prayer oils, etc., which are very dear to the hearts of all traditional Muslims. One of the Plaintiff's prayer rugs was on the missing property list...the Plaintiff had serveral bottles of oils were missing (4 ounce bottles purchased in DCDC-Lorton.

[23] That upon information and belief Muslim inmates especially since September 11, 2001 have been subjected to very hard times and bad treatment at the hands of both FBOP, State and Local prison employees. Reports from all over the Country have come in on their(Muslims)'s) property, especially religious property has been destoyed, confiscated, looted,lost, stolen or taken without cause or justifications. These conditions takes on an Islamiaphobia(harassment) attitude.

[24] That Plaintiff's religious magazines(about five in nunber) "Al-Jumu'ah were also removed from the property of the Plaintiff left in the USP-Atlanta R & D Unit. The FBOP do have policy on "not transfering magazines and newspapers, however, if the Plaintiff is not their to sent those items home, theyshould be mailed on the the receiving institution, and allow them to deal with the issues. After all they have the same Rules and regulations in all FBOP facilities. They should never just confiscate a persons property and do as they please with it.

[25] That in the Plaintiff's Exhibit No. (2),(attached hereto is a listing of all property items missing from Plaintiff's left in the care of Officer, D. Quinones, OIC of

the R & D USP-Atlanta, Ga.property room...The list also tells where the missing items were purchased or bought in the FBOP and/or USP-Canteens, in the DCDC-Lorton, Va. Facilities.

Heighten standards Of Review and Factural Details:

[26] That before the closing of the DCDC-Lorton, Va.facilities, the Plaintiff along with forty(40) other prisoners was transfered to the USP-Atlanta, Ga.FBOP Facility. He was being domiciled more than 500 miles away from his home-base in Washington, D.C. ..(something the U.S. Attorney General said he would not do to DCDC-prisoners. Thus, the Plaintiff in 2003 requested that he be transfered closer to home base-Washington, D.C. so as to be able to get a visits. The USP-Atlanta caeworker therefore, put the Plaintiff on the list for transfer to a new facility opening up in Kentucky, USP-Big Sandy.

[27] That Defendant D. Quinones, should have know that if he left Plaintiff's property unsecuried in the USP-Atlanta R & D unit, that some of it if not all could get missing. Thus,he showed neligency and an total-indifference concerning the Plaintiff property that he took charge of and promise to take care of.

[28] That Defendant, R. Wiley, the former-warden of USP-Atlanta, Ga. was the chief policy making officer in the USP-Atlanta and should have known then his staff was unable to carry out his job properly and need assistance..in the R & D Unit. In fact the R & D Officer requested assistance a number of times to no avail...The Defendant's negligency, and indifference to the needs of R & D staff and lack of proper supervision cause the lost of the Plaintiff's property.

[29 that Defendant, Harley Lappin is the Director of the FBOP and it is his duty to see that all his staff are train properly and adequately supervised. He is the chief policy maker for the whole FBOP and should haveknown that the property policy was not being implimented properly in the USP-Atlanta Facility.

[30] That Defendant, Federal Bureau of Prisons is an agent and/or agency of the United States and is therefore subordinate to the . Anything it dose is as if the United States is doing it. It operated under the color of federal law and for the United States.

[31] That the United states is the proper Defendant under FTCA, and that all defendants sued in the Official Capacity are as though suing the United States. Therefore the Plaintiff ope to have a Judge trial under FTCA and supplimental juridiction 28U.S.C. §1367(a). That the United States is the representative government and as such consents to be sued and is the only proper person sued under FTCA, and takes the responsibility for the negligency and indifference of its' employees.

[32] That Defendants as individuals are sued in their individual capacities and a jury trial is demanded pursuant to 28 U.S.C.§1331 §1343 and 1346(b), and 42 U.S.C.§ 2000bb-1 and § 2000cc-1 and28U.S.C,§1367(a)

[33.] During the first days of December, 2003 the R & D office, Qun'anis, called Plaintiff, et al., over to the USP-Atlanta's R & D and gave up green army duffal bags with which to pack out on 12/2/03. Thus, that Tuesday Dec. 2, 2003 the Plaintiff with the of his celly and several friends packed his property in the bags and took it over to the . After waiting half a day for the inventory and boxing of the

said property OIC-Qun'anis (who was working by his self) informed the Plaintiff that he was not going to be able to get to the inventory of Plaintiff's property before it was time for him to go home. However,he informed the Plaintiff "if you leave your property here(infront of him) I'll make sure that all your property is shipped to USP-Big SAndy, no matter how many boxes it take." Thus, the Plaintiff was unable to get his property properly inventoried in this presence and be given a receipt for the same. Thusly, the inventory slip sent to USP-Big Sandy was dated December 8th, 2003. That means that the Plaintiff's property layed around the R & D Room at least six days before it was ever inventoried. Said property was given to the Plaintiff at Big Sabdy-USP onor about December 18th or 29th, 2003...

[34.] Plaintiff official transfer from USP-Atlanta, Ga. to USPB-Big Sandy took place on Wednesday December 3rd, 2003 agong with 20 other inmates. Thus when Plaintiff's property arrived at USP Big Sandy he was called thr R & D and it was inventoried and he was told to sign for it. He at that time informed the R & D Staff that some of his property was not there. He told to sign for what he got because that was all that they had been sent. Plaintiff was informed that if some of his property was missing then he should file a Federal tor claim. The plaintiff at that point was not sure of what all was missing from all the property he had left at the USP- Atlanta, Ga. facility but he knew that certain items was not there. Plaintiff requested a copy of both USP-Atlanta and USP Big Sandy's inventory slips. He was informed to put in a formal request for the USP-Atlanta inventory list and they would srnd it to him. Thus, the Plaintiff signed USP-Big Sandy inventory for the property that he gotten. The USP-Atlanta property slip had been signed by two staff persons in USP-Atlanta. Thus, when the plaintiff obtained both property slips be compared

them item for item. They both were the same. So the missing property was never listed on the USP-Atlanta, Ga. facility property slip inventory. Thus, the Plaintiff signed at USP-Big Sandy for what was delieved to him at the R & D , and not for the missing property!!!

[35.] Thusly, only after the Plaintiff was able to accest all the items missing from his property did he file the(attached) Plaintiff's Exhibet # 2 under the federal tort claim Act for damages on the property that was missing...to not avail!!! Thus this redress was and is permitted by law.

[36] That Warden Wiely, USP- Atlanta Was their Supervisor to the OIC, Qun'anis, and was responsible for seeing that office Qun'anis had the proper amount of assistance to secure properly all inmates propety in the R & D Room . This he did not do; for OIC-Qun'anis said that he need help in caring for and packging inmates property. He said he had requested assitance to no avail.

[37.] The Plaintiff after filing his tort clim on December 30, 2003 with the Southeast Regional Office Director he received on March 2, 2004 a missive ackownledging the receipt of Plaintiff's claim and that it had been filed as # TRT-SER-2004-02083, (said missive is attached hereto as Plaintiff's Exhibit #3).

38. That the PLaintiff have produced in Plaintiff's Exhibit #2's Affidavit a listing of all missing items and the commissary receipts showing when and where said items purchased. All the neccary and requested information was provided to the regional investigator that would show ownership of the missing property...to no avail. The denied pPlaintiff's claim...without ever even interviewing the Plaintiff or checking Plaintiff's claim out fully...It was a

clear denial of due process in the sham investigation. The date of said denial of Plaintiff's claim came on August 11, 2004...thereby giveing the Plaintiff leave to sue in the appropriate United States District Court. Thusly, it was the Southeast Regional Director's Office that had the whole resonsibility to see that the Plaintiff was give a just and proer investigation and that proper restitution was made. This he did not do and failed in his resonsibility ty the Plaintiff and the BOP!!!

THE CONSEQUENCES OF DEFENDANT's WRONGDOING

COUNT I : VIOLATIONS OF 28 U.S.C. Secs. 1331 and 1334...& 42 U.S.C. 2000bb-1 Etc...& 2000cc-1:

[39.] The Plaintiff here repeat and reallege paragraphs 1- 38 above as if fully stated here.

[40.] The Plaintiff is a Sunni Muslim and over the years have practiced his faith to the fullest. This have earned him much harassment,via., prison official confisation and distruction of both his legal and religious property time after time. It seem as though the many prison employees think that they can hurt you best taking your personally owned property...This have been the case in both the DCDC system and the BOP...It is a matter of record that this form of harassment has continued with me year after year.

[41.] That Defendants in their individual and official capacity acted under color of federal law and regulations in connection with the conduct alleged herein.

[42.] That the Defendants intentionally or through deliberate indifference denied Plaintiff's rights under the First and Fifth Amendments of the Constitution, also neligency and malice afore thought; and with a mean spirited intent to hurt the Plaintiff as a means of Islamaphobia.

[43.] That Defendants, acting under color of federal law and regulations denied Plaintiff proper, safe and reasonable care and inadequate man-power to opperate an efficient R AND D Unit. Many inmates were allowed in areas ehere they by regulations were not suppose to be by BOP regulations.

[44.] That Defendants acting under color of federal law and regulations maintained and /or executed policies, prectices, customs and contracts that because of they negligent actions denied Plaintiff rights to his property and due process, under the First and Fifth Amendments to the Constitution...of these United States of America!

[45.] That Defendants, acting under color of federal law and regulations, failed to secure and pursue a course of neutrality toward Plaintiff's property, willy took Plaintiff's prayer rug, Holy Qun'an, Preyer Oils and religious magazines and newspapers...in violation of the BOP with respect to filing out confisational forms etc.,and with BOP Policy that allows and permits the same to be done...the destruction of newspapers and magazines (of a religious nature was a right the Plaintiff injoyed under the free exercise clause of the First amendment to the Constitution.

[46.] That Defendants, acting under color of federal law and regulations discriminated against Plaintiff by failing to properly investigate Plaintiff's federal tort claim,

thereby violating his rights to equal protection and due process in their one sided investigation.

[47.] That Defendants confiscations, and negligent actions were not reasonably related to any legitimate penal or custodial purpose.

[48.] That Defendants conduct was the results of evil malicous motives or intent and involed reckless or callous indifference to the Plaintiff's needs or federally protected rights.

[49.] And that as a direct and proximate result of said violations by individual Defendants or their subordinates, Plaintiff have suffered mental pain and hurt injuries which include but are not so limited to deprivation of loved and sacred religious items and Islamic literature of his faith that can not be replaced.

COUNT II: VIOLATION OF 42 U.S.C. SEC.2000bb-1(RFRA) 2000cc-1(RLUIPA) and 1st,4th & 5th Amendments:

[50.] Plaintiff restate and reallege paragraphs 1-59 as if fully states here.

[51.] That Defendants in their individual and official capacities acted under color of federal law and regulations in connection with all violations alleged herein.

[52.] That The Defendants intentionally or through deliberate indifference substantially burdened and pained Plaintiff's exercise of his religion by unlawful confiscation/taking Plaintiff's two Holy Qur'ans (of which he had owned for 20 and 15 years respectfully), Prayer

rug(which he had prayed on for over 20 years), Prayer Oils and magazines /newspapers...all in violation of the free exercise of Plaintif's rights under RFRA.

[53.] That Defendants acting under color of federal law and regulations failed to observe the letter of the BOP's policy and regulations that pertain to inventories of inmates property when they are being transfered, and they failed to observe the same policy when confiscating an inmates property...which was not done in furtherance of a compelling government interest...Thereby substantially burdening Plaintiff's free exercise rights under RFRA and "RLUIPA".

[54.] Thusly, as a direct and proximate result of said violations by Defendants and/or their subordinates. The Plaintiff have suffered and continue to suffer the lost anddeprivation, which include but are not limited to deprivational injuries of a mental nature for not being able to use the religious items in the practice of his faith...,substantially burdening the Plaintiff's practice of his faith in violation of his rights under "RFRA" and "RLUIPA"

[55.] The Defendants' acts and omissions with respect to proving proper inventory processing and filing of proper confiscation froms constituted a violation of FBOP Police and regulations issued undet FBOP-P.S.# 5580.06 ("Personal Property of Inmate" dated 7/19/99), and therefore, substantially burdened the Plaintiff rights under "RFRA"and Rluipa"; 28 US.C.§1331, §1343; 1346(b)...also the First, Fourth and Fifth Amendments to the Constitution.

PRAYER FOR RELIEF

WHEREFORE,the Plaintiff prays for a judgment in his favor and against the Defendants as follows:

[1] For compensatory damages against the United States in the amount of one-hundred and twenty-five thousand dollars ($125,000.00).

[2] For compensatory damages, from each individual Defendant in his individual/personal capacity, in the amount of fifty-Thousand dollars ($50,000.00).

[3] For punitive damages, each individual Defendant(other than the United States),in the amount of thirty-Thousand dollars ($30,000.00) each.

[4] For reasonable expenses, inclusive of Attorney fee and Court costs pursuant to 42 U.S.C. §1988...AND

[5] For Injunctive Relief, and for further relief asCourt determines to be just and proper.

Respectfully Submitted,

/s/ /s/_____

Abdus-Shahid M.S. Ali, Pro Se.,
USP-REG.No.03201-000
USP-Big Sandy/P.O.BOX-2068
Inez, Kentucky 41224

cc: Copies are sent to Counsel for
the Defendants: Stephen H. McCLain,
Assistant U.S. Attorney...at 600 U.S. Cousehouse
75 Spring Street, S.W.

Atlanta, Georgia 30303
[404] 581-6000

[CERTIFICATE OF SERVICE OMITTED]

PLAINTIFF'S EXHIBIT # 1

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA

Fulton County
Atlanta, Georgia

AFFIDAVIT

TO WHOM IT MAY CONCERN:

The Plaintiff, Abdus-Shahid M.S. Ali,being affirmed according to law and under penalty of perjury hereby states as follows;

1. That the Plaintiff is sentenced under the District of Columbia Code (D.C.C.) to the U.S. Attorney General. He was transfered into the Federal Bureau of Prisons just prior to the closing of the DCDC-Lorton-Central Facility...on the fourteenth of August, 2001...and Lorton close on or about October, 2001.

2. The plaintiff having been sent more than 500 miles fromhome requested (in 2003) his caseworker to be transfered closer to home. Said caseworker put Plaintiff in for a transfer to one of the newest USP's at Big Sandy in Inez, KY.,instead of the USP-Lewisburg, Pa. that the Plaintiff had requested.

3. During the week of December 1st, 2003 the Plaintiff was called to the USP-Atlanta receiving and Discharge(R & D) and given two green Army duffal bags. He was told to

bring all his property to the R & D on Tuesday morning(12-2-03).

4. This he did and on that morning Plaintiff waited in line all the morning to get his property inventoried so that it could be done in his presence. But that was not to be. At about 1:00PM the Plaintff was informed by OIC-Qun'anis(the R&D OFFICE IN CHARGE), that he would not have time to inventory anymore property before he he got off working and going home. OIC-Qun'anis informed the Plaintiff that he was the only staff person assigned to inventoring property of the inmates that were being transfered...He said that he had requested the administation for assistance to no avail. OIC-Qun'anis explained to the Plaintiff to leave his two open green army duffal bags right in front of in the property room doorway and that he would take care of it from there. He said that since I was not doing to be there then the inventory slip was made he would make sure that all my property was forwarded to USP-Big Sandy. OIC-Qun'anis said that he would get to it but it might not be before I was transfered out. He reassured the Plaintiff that he would make sure that all of the Plaintiff's property was boxed out even if he had to use more than two boxes limit to get all the property to USP-Big Sandy.

5. There being nothing he could do...the Plaintiff left all his property in the care of the R & D OIC-Qun'anis. The next morning Plaintiff was transfered from USP-AtLanta, Ga. to USP-Big Sandy along with 20 other inmates...on December 3, 2003.

6. The PLaintiff was called to USP-Big Sandy R & D to get his property, sent from the USP-Atlanta , Ga. on or about December 29, 2003. Said property was inventoried

and processed. Some was given to me, a few items was sent home and a few items was held entil approved via the chaplains office or tha warden's office. The Plaintiff found a number of items missing from his property left in the care of officer Qun'anis. Plaintiff did inform the USP -Big Sandy staff in the R & D about the missing items. Said staff informed the Plaintiff that there was nothing they could do about that and that the Plaintiff would haveto file a Federal Tort claim. The Plaintiff requested a copy of the USP-Atlanta, Ga. inventory claim...so as to compare the two inventory slips. The OIC-Big Sandy R & D staff person informed the Plaintiff"put in and official request form and they would send it to him." This he did. All the items listed on both forms were the same though not listed in the same order. The Plaintiff thus signed on Dec. 29, 2003 for the property he had received and seen at USP -Big Sandy. The property that was and is missing was not listed on the USP-Atlanta, Ga. inventory slip. Therefore either and staff person or an R & D inmates(Working within R & D) took the missing items out of the inmates'property before the property was inventoried. By information and belief the USP- OIC Qun'anis had been said to have taken muslim inmates Qun'ans and other religious items out of inmates property when he though they had more than one or when he for whatever reason thought items like pray rugs belonged to the chaplains' office. All of the items missing out of the plaintiff's property belonged to him and were either purchased in the canteen, or through the institutional process, or brought to the USP-Atlanta, Ga. on Agust 1st, 2001 transfer from the DCDC-Lorton, Va.Facility.

7. It is noted that the date the USP-Atlanta property slip inventory took place was December 8th, 2003. Thus, it is reasonable to beleive and access that Plaintiff's property

in the two open green duffal bags layed around the USP-Atlanta R & D for at least six(6) days before it was ever inventoried...Giving ample time for any staff or inmate to take or remove said missing items from the Plaintiff's duffal bags. The manner in which the Plaintiff's property was secured is a violation of the BOP policy.

8. With the USP-Atlanta, Ga. R & D having only one office running it Mr. Qun'anis, the OIC is forced to have a number inmates working for him in the Usp-Atlanta property Room. And upon information and belief they were stealing every thing that was not nailed down(so-to-speak). However, by BOP policy inmates are not allowed in the areawhere inmate property is suppose to be kept...BOP-Program Statement- # 5580.06 (Dated 7-19-99). Even the correctional staff is suppose to be limited into the property room.

9. The Plaintiff thus filed his federal tort claim to the BOP-Southeast Reginal Office Director , on December 30th, 2003. Said office acknowledged receipt on March 2, 2004...vir., Gere Gooden signing for Lisa M. Sunderman, Regional Counsel,

10. Thus, on August 11th, 2004 the Defendants rejected and denied the Plaintiff's claim without reaally investigating the items lost that Plaintiff canteen slips to show he had purchased certain items, Nor was the canteen slips cited in the original tort claim checked to see that all reported missing items were owned by the Plaintiff. If the investigatorys had done that then there would be no way they could have denied the tort claim!

11. The Defendants' investigation stated in pertinent part as follows :

" Our investigation reveals on December 18, 2003, January 29,2004 and March 24, 2004, you were issued your personal property at your current facility. You reviewed your personal property and signed section 10b. of the information. You did not inform staff of any discrepances or missing personal property. Further, you failed to provide documentation you had any of the alleged missing items in your possession prior to your transfer in 2003."

12. The above defendant's response is totally incorrect and wrong! The dates cited are all dates that was given to the plaintiff from the one and only shipment of property sent from the USP-Atlanta, Ga, on or abourt December 29, 2003...The Pklaintiff's missing property was never apart of the property sent to USP-Big Sandy. The dates listed were dates that some property was appoved by the staff chaplain's or by the warden's for the Plaintiff to have. All that property arrived at USP Big Sandy the same day. No documentation was requested of the plaintiff.

13. The Defendants cite in their missive of August 11, 2004 section 10 of form BP-383 as a "claim relest",(that is not ture!),which they are trying to say that by signing the USP-Big Sandy inventory slip that the Plaintiff signed away his rights to sue or file a claim against them. That possition is untenable by the defendants.

14. The Plaintiff never signed the USP-Atlanta, Ga. inventory(that was signed by USP-Atlanta Staff. But be did sign the USP-Big Sandy inventory slip for all the property that he had received from USP -Atlanta . That never was inclisive of the missing USP-Atlant,Ga. property.

15. The USP-Atlanta, Ga. inventory and the USP-Big Sandy inventory slips were the same... the two institutions just listed the different items in diferent listings. But the property sent was the same the USP-Big Sandy staff acknowledged and I siged for as haveing received the same. That had nothing to do with my missing property left in the USP-Atlanta care! Thus based an the above the Defendants denied the Plaintiff's claim. Thus the Plaintiff is now sueing the Defendants, for pain and suffering, troubles and dammages and court costs etc.

16. The Plaintiff affirms under the penalty of perjury that the statements cited above are true and correct to the best of his information and beliefs . The Same is affirmed here on this 4 day of October, 2004, before said notary public .

Respectfully submitted,

/s/ /s/_____
Abdus-Shahid M.S. Ali(#03201-000)

/s/_____
Notary Public

[SEE FOLDOUT PAGES FOR PLAINTIFF'S EXHIBIT # 2 PAGES 1-2]

BEST AVAILABLE COPY

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of the form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:	2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
Regional Director's Office Southeast Region 2800 Camp Creek Pkwy.SW, Bldg.2000 Atlanta, Georgia 30331	Abdus-Shahid M.S. Ali #03201-000 USP-Big Sandy///P.O.Box 2068 Inez , Ky.41224

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. or P.M.)
☐ MILITARY ☒ CIVILIAN	3/26/44	None	Dec. 2nd truough8th, 2003	n/a

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

The claimant was called to the USP Atlanta, Ga. R &D rm. to submit his personal property to the OIC. The OIC informed the claimant that there was a long wait and that because of all the property the claimant had he did not think that he was going to get to the Claimant's property. However, he said that if the claimant was to leave the said property right there in front of him he the OCI,Mr. Qun'anis, would inventory all the property and send all of it on to USP Big Sandy.

The claimant did not have a choice in the matter, as he was said to be leaving Wednesday morning 12-03-03. However, the date on the USP- Atl. ***See Next Attahed Page***

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)

N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

**********PLEASE SEE ATTACHED PAGE AND AFFIDAVIT**********

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

**********PLEASE SEE ATTACHMENT AND AFFIDAVIT**********

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
Lenard Hull #o7005-021	USP ATLANTA, GA.,P.O.BOX /PMB 1000 601 Mc Donough blvd., S.E. Atlanta, Ga. 30315

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
Property was lost/ Property lost	N/A N/A	N/A	Total Cost $ 177.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
Abdus-Shahid M.S. Ali	N/A	12/30/03

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)	Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109
Previous editions not usable.
Designed using Perform Pro, WHS/DIOR, Jun 98

NSN 7540-00-634-4046

STANDARD FORM 95 (Rev. 7-85) (EG)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the followings: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to which you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegation accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to: Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes. If yes, give name and address of insurance company (Number, street, city, State, and Zip Code) and policy number. ☐ No

N/A---Claimant is a prisoner in the B.O.P. at USP-Big Sandy, Inez, Ky.

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

: N/A.....

17. If deductible, state amount

..NO: N/A

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? *It is necessary that you ascertain these facts*

N): N/A.....

19. Do you carry public liability and property damage insurance? ☐ Yes, if yes, give name and address of insurance company (Number, street, city, State, and Zip Code) ☒ No

N/A.

SF 95 (Rev. 7-85) BACK

PLAINTIFF'S EXHIBIT # 2 PAGE 3

Continues Item 8: (P.2 to Item#8–Bases of claim)

Georgia, property slip was/is December 8, 2003; which means that claimant's property (two(2) green duffal bags)lay in the property for at least five(5) days before the property OCI, Mr. Qun'anis, got around to packing and inventory claimant's property. The claimant did not get his property at USP Big Sandy until December 18, 2003.

All the claimant's property items were purchased in Atlanta U.S.P. canteen, except those items that were purchased or obtained in the Lorton Central Facility (D.C. Dept. of Corrections).

The USP Atlanta, Ga. R&D violated the F.B.O.P. Policy on Inmates Property by not inventorying said property in claimant's presence and having him sign property slip and receive a copy of the same.

The claimant's Canteen Slips which are on file in the USP Atlanta canteen files will show all items purchased over time in the U.S.P. Atlanta canteen. All other items on the lost property listing were gotten in the D.C.D.C. Lorton, Va.

Wherefore, the Claimant requests reimbursement for all lost items listed in the attached affidavit.

/s/ /s/ _____
Abdus-Shahid M.S. Ali
Fed. Reg. No. 03201-000

PLAINTIFF'S EXHIBIT # 2 PAGES 4-5

COUNTY OF MARTON
Inez, Kentucky
....AFFIDAVIT.....
(ON, LOST PROPERTY LEFT IN THE CARE
OF USP-ATLANTA, GA. OIC, QUN'ANIS-12/2/
.....

Comes now the Claimant, Abdus-Shahid M.S. Ali # 03201-000, being duely affirmed accornding to law do state as follows:Taht the statements below are all true and correct to the best of the Claimants knowledge.

MISSING PROPERTY LEFT IN THE
HAND OF THE USP ATLANTA OIC,
Qun'anis, R. & D. Officer

ITEMS MISSING FROM PROPERTY LEFT ///	COST FACTOR OF EACH ITEM
One(l) Holy Qur'an By Y. Ali (DCDC)	$20.00
One(l) Pocket Holy Qur'an By Y. Ali	$ 6.00
Three(3) Books of .37¢ stamps(USP Atl.)	$22.20
Six fifty Cent(.50¢) Stamps(DCDC)	$ 3.00
Three(3) .80¢ (purchase in DCDC) Stamps	$ 2.40
One (1) TracII Razor(DCDC)	$ 5.95
One (1) Pk of Trac II Blades (USP Atl)	$ 3.00
One(l) Watch Battery(DCDC)	$ 2.20
One(1) Mirror (USP Atl.)	$ 2.20
Eight(8) Color Markers (DCDC)	$ 7.50
Ten(10) Wash Cloths (purchased USP Atl.)	$ 4.00
One(l) Prayer Rug (purchased DCDC)	$20.00
One(1) MasterLock (USP Atl.)	$ 6.10
One(l) Thermal Top (puchased USP Atl)	$ 9.90

One(l) Thermal Bottom (USP Atl.)	$ 9.90
Two (2) Pks. Tube Socks (USP Atl)	$18.80
Five(5) Clothes Hangers (USP Atl.)	$ 1.25
One(l) U.S.P. Atlanta Commissary Card w/$7.00 on it	$ 7.00
Total Cost Factor	$ 177.00

* Please see the Claimant's Exhibits as evedenced herein!!!

/s/ /s/_____
Abdus-Shahid M.S. Ali
Reg. 03201-000
USP-Big SaNDY/P.O.Box 2068
Inez. Kentucky 41224

Be it affirmed and subscribed to before me on February 19th, 2004.

/s/ /s/_____
USP Big Sandy* Notary Public*

[SEAL]

[SEE FOLDOUT PAGE FOR PLAINTIFF'S EXHIBIT # 2 PAGE 6]

U.S. Department of Justice
Federal Bureau of Prisons

Inmate Personal Property Record
Institution: USP Atlanta

1. Name: Ali, Abdus-Shahid	2. Register Number: 03201-170	3. Unit: C H	4. Date and Time of Inventory: 8-14-01 10:20

5. Purpose of Inventory (check one that applies): Date and Time of Action: 8-14-01 10:20
a. ___ Admission b. ___ Hospital c. ___ Writ d. ___ Transfer e. ___ Detention f. ___ Release
g. ___ Incoming package h. ___ Other (specify)

6. Disposition (Disp.)
D - Donated M - Mail S - Storage
K - Keep in Possession
C - Contraband (Attach BP-Record-102)

7. Type of Property:

a. Personally Owned Items

#	Article	Disp.
	Batteries	K
	Belt	
	Billfold	
1	Books, religious hard 1, soft	K
17	Books, religious hard 12, soft 5	K
	Brassiere	
	Cap, Hat	
	Coat	
	Colon	
	Comb	
	Combination lock	
	Dress	
	Driver's license	
	Earplugs	
	Eyeglass case	K
	Eyeglasses	K
1	Gloves	M
	Hair brush/pick	
	Handkerchief	
	Jacket	
	Jogging suit	
	Legal Materials	
1	Letters	K
11	Magazines	K
	Mirror	
	Nail Clippers	
	Pen/shafts	
	Pen, ballpoint	
	Pencils	
1	Personal papers	K
	Photo album	
	Photos	

#	Article	Disp.
1	Plastic spoon; cup	K
	Playing cards	
	Purse	
	Radio (w/earplug)	
1	Religious medals	K
	Ring	
	Shirt/blouse	
	Shoes	
1	Shoes, shower	K
1	Shoes, slippers	M
1	Shoes, tennis	M
	Shorts	
	Skirt	
	Slip	
	Social security card	
	Socks	
	Socks, athletic	
	Stamps	
	Stockings	
	Sunglasses	
	Sweater	
2	Sweat pants	K
1	Sweat shirt	K
	Thighs	
	T-Shirt	
	Underwear	
1	Watch wrist/hand	K
1	Wig Medium length	K
1	Prayer Rug	K
1	Backpack	M
1	Cassette	K
1	Legal Paper	M
2	Key locks	M

b. Hygiene, etc.

#	Article	Disp.
	Dental floss	
	Deodorant	
2	Deodorant	K
	Hair oil	
	Hairpins	
	Powder	
	Razor	
	Razor blades	
	Shampoo	
	Shaving lotion	
	Skin lotion	
1	Soap	K
1	Soap dish	K
1	Toothbrush	K
2	Toothpaste	K
2	Misc Hygiene items	K

c. Food/Tobacco Items

#	Article	Disp.
	Canned tobacco	
	Chewing tobacco	
	Cigarettes	
	Cigars, snuff	
	Confectionate	
	Cold drink mix, soda	
	Fruit	
	Honey, Hi-protein	
	Instant chocolate	
	Instant coffee	
	Instant tea	
	Pipe cleaners/filters	
	Pipes	

d. Miscellaneous

#	Article	Disp.

e. Miscellaneous (List any donated property and from whom it was received, e.g., U.S. Marshal)

8. Items Alleged by Inmate to Have Value Over $100.00

Description of Property	Value Alleged by Inmate

☒ No individual item over $100.00

9. Article(s) Listed as "Mail" (M) Are to be Forwarded to (Name and Address of Consignee):

Civil Rights Corps, 713 Maryland Ave NE, Washington DC 20002

10. Claim Release: a. The receiving officer, as soon after receipt of the property as possible, will review the inventory with the inmate to verify its accuracy. Property that is stored, kept in possession of the inmate, mailed out of the institution, or donated is to be marked in the appropriate section of this inventory form. The receiving officer certifies receipt, review and disposition of the property by signing below. The inmate by signing below certifies the accuracy of the inventory, except as noted on the form, relinquishing of all claim to articles listed as donated, receipt of all allowable items, and receipt of a copy of the inventory. When the inmate claims a discrepancy in the inventory, the receiving officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Receiving Officer: K. Williams/K... Date: 8-14-01 Time: 10:20

I have today reviewed the property returned to me. Signature of Inmate: Abdus-Shahid Ali Reg. No.: 03201-170 Date: 8/14/01 Time: 1230 AM

b. Upon release of the inmate from the unit, detention, etc., the releasing officer is to give the inmate that property stored as a result of the inmate's housing. The inmate certifies release of the property, except as noted on this form, and receipt of a copy of the inventory by signing below. When the inmate claims a discrepancy in the inventory, the releasing officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Releasing Officer: _____ Date: _____ Time: _____

I have today reviewed the property returned to me. Signature of Inmate: _____ Reg. No.: _____ Date: _____ Time: _____

Original — Inmate's Central File; CC: Inmate, R & D, Special Housing

[SEE FOLDOUT PAGES FOR PLAINTIFF'S EXHIBIT # 2 PAGES 7-9]

Plaintiff's Exhibit #2 Page 1

USP ATLANTA-LIMITED OFFICIAL USE
HERRICK'S STATION

SALES INVOICE
ALI, ABDUS-SHAH
ACCOUNT No. 03201000 A P
11/05/01 Time 19:46:46 TXN 000029 16
BEGINNING BALANCES:
Available Balance is 302.64
Spending Limit Balance is 275.00
Account Balance is 302.64

QTY	DESCRIPTION	PRICE
1	COUNTRY CRNE	.55
1	COUNTRY CRNE	.55
2	BLUEBELL PINTS	2.80
2	SPRITE	1.10
1	CRNE	1.90
1	STRAWBERRY SODA	1.90
1	BLUEBIRD PINEAPPLE	2.50
1	BLUEBIRD PINEAPPLE	2.50
1	BLUEBIRD ORANGE JUC	2.50
1	BLUEBIRD GRAPEFRUIT JUC	2.50
3	FISH STEAK, DIN SOC	2.25
2	CHILI W/BEANS	1.70
2	BEEF STEW	1.90
1	TONE SKIN CARE	3.85
1	TONE SKIN CARE	.85
1	DIAL SOAP	.70
1	DIAL SOAP	.70
1	SNICKERS BAR (6PK)	1.30
1	PANASONIC "AA" BATT	4.35
1	ZESTA BEEFTAILS	2.70
2	DUNKING STICKS	2.50
2	RAMEN, CAJUN SHRIMP	.40
1	TWIN SUE-R	1.55
1	THERMAL TOPS	3.50
2	RAMEN, SPICY CHICK	.40
1	RAMEN, SPICEYBEEF	.50
2	RAMEN, BEEF FLAVOR	.40
1	RAMEN, BEEF FLAVOR	.20
1	RAMEN, CAJUN STYLE	.20
3	NON FILTER KING	4.95
1	PRE-COOKED RICE	.99
1	SPANISH RICE/CHEESE	.50
1	HALLS MENTHO-LYPTUS	.60
1	HALLS MENTHO-LYPTUS	.60
1	PANASONIC "AAA" BATT	2.50
1	SLATE GRAY PITCHER	2.95
1	GENERAL BOWL MALID	.60
1	MUSTACHE SCISSORS	6.10
1	GARLIC BULBS	.45
1	GARLIC BULBS	.45
1	CERTS PEPPERMINT	.55
1	COCOA BUTTER STICK	11.25
1	PEN	.55
1	PEN	.25
1	WASHCLOTHS	.40
1	WASHCLOTHS	.40
	SUB TOTAL	77.70
	TOTAL	77.70
	CHARGE 03201000	77.70

ENDING BALANCES:
Available Balance is 1,814.94
Spending Limit Balance is 197.30
Account Balance is 1,814.94

Signature
HOLIDAY, MONDAY NOVEMBER 12

This also shows that More Thermal Tops were purchased in the US. P-Atl. But did not Arrival at the U.S.P. Big Stone

A.S.M.S.A.

nicholette are also missing & will be picked that were purchased in the US P-Atl. station.

A.S.M.S.A.

USP ATLANTA-LIMITED OFFICIAL USE
ALFYE'S STATION

SALES INVOICE
ALI, ABDUS-SHAH
ACCOUNT No. 03201000 A P
06/17/02 Time 18:46:46 TXN 000059 69
BEGINNING BALANCES:
Available Balance is 3,827.91
Spending Limit Balance is 150.70
Account Balance is 3,227.91

QTY	DESCRIPTION	PRICE
2	BLUEBELL PINTS	2.90
1	COUNTRY CRNE	.60
1	SNICKERS ICE CREAM	.80
1	COFFEECREAMER	1.30
1	COFFEECREAMER	1.30
4	BEEF MAYONAISE	3.00
1	NEWPORT KINGS PACK	3.65
1	FRZ DRIED COFFEE	2.45
1	SNICKERS BAR (6PK)	2.80
4	IVORY SOAP	2.80
1	INSTANT TEA	1.65
1	HOUSE THONGS	.90
4	RAMEN, CAJUN SHRIMP	1.60
1	BLUEBIRD PINEAPPLE	2.60
1	BLUEBIRD PINEAPPLE	2.60
1	BLUEBIRD ORANGE JUC	2.60
1	BLUEBIRD GRAPEFRUIT JUC	2.60
1	CALIFORNIA MIX	.85
1	CALIFORNIA MIX	.85
14	RAMEN GARLIC SPICE	11.60
10	RAMEN GARLIC SPICE	10.00
5	MACKEREL (PKT)	5.25
1	PANASONIC "C" BATT	2.35
1	MASTER COMBO LOCK	6.10
2	PRE-COOKED RICE	1.98
4	BUTTER POPCORN	2.00
4	SPANISH RICE/CHEESE	2.00
1	BEEF MAYONAISE	.75
2	STRAWBERRY SODA	3.90
1	HALLS MENTHO-LYPTUS	.65
1	HALLS MENTHO-LYPTUS	.65
1	SPRITE	1.95
1	SPRITE	1.95
1	PANASONIC "AAA" BATT	2.50
1	BBQ CORN CHIPS	2.20
1	BBQ CORN CHIPS	2.20
7	GRAY LAYS	9.80
1	T-4000 BEARD TRIM	25.00
1	SONY SPRINTER RADIO	20.80
1	VENDING MACH. SALES	15.00
1	VENDING MACH. SALES	-2.00
4	IVORY SOAP	-2.80
2	IRISH SPRING SOAP	1.60
1	VENDING MACH. SALES	2.00
	SUB TOTAL	150.00
	TOTAL	150.00
	CHARGE 03201000	150.00

ENDING BALANCES:
Available Balance is 3,077.91
Spending Limit Balance is .70
Account Balance is 3,077.91

Signature
CLOSED FOR INVENTORY 6/24-6/28, 2002

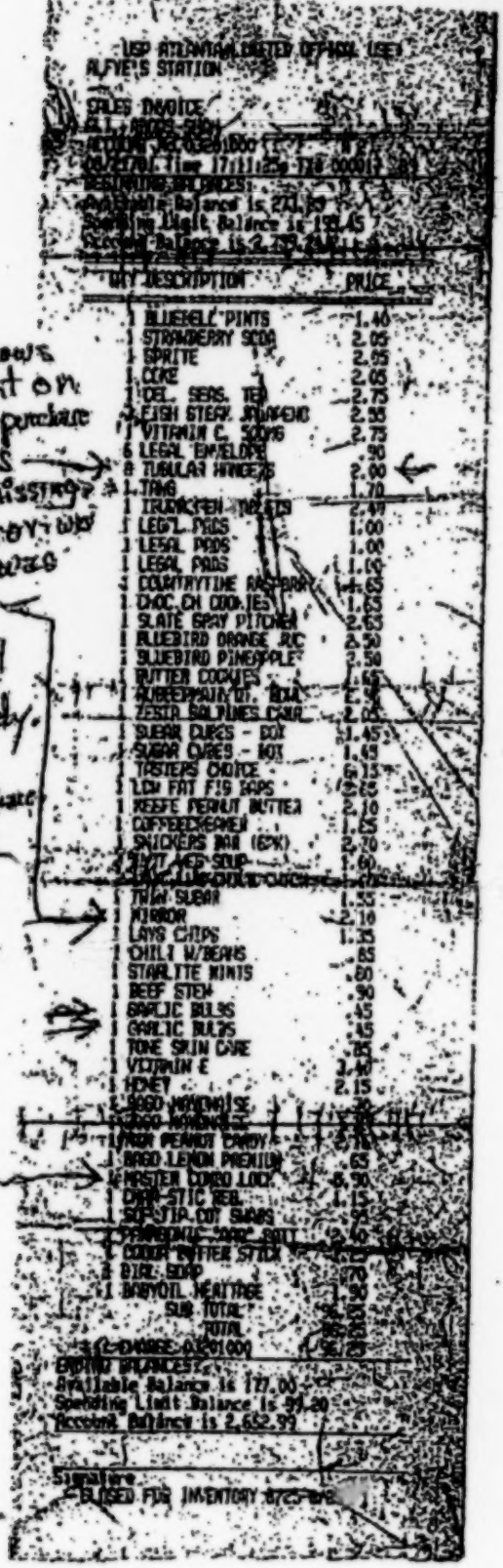
ASMSA

Purchase of master Lock

This Slip shows that the claimant did purchase a Beard Trimmer that was taken out of claimant property in the U.S.P-Atl.

ASMSA.

Claimant's Exhibit # "4"



USP ATLANTA,GA(FED OFFICIAL USE)
ALVIE'S STATION

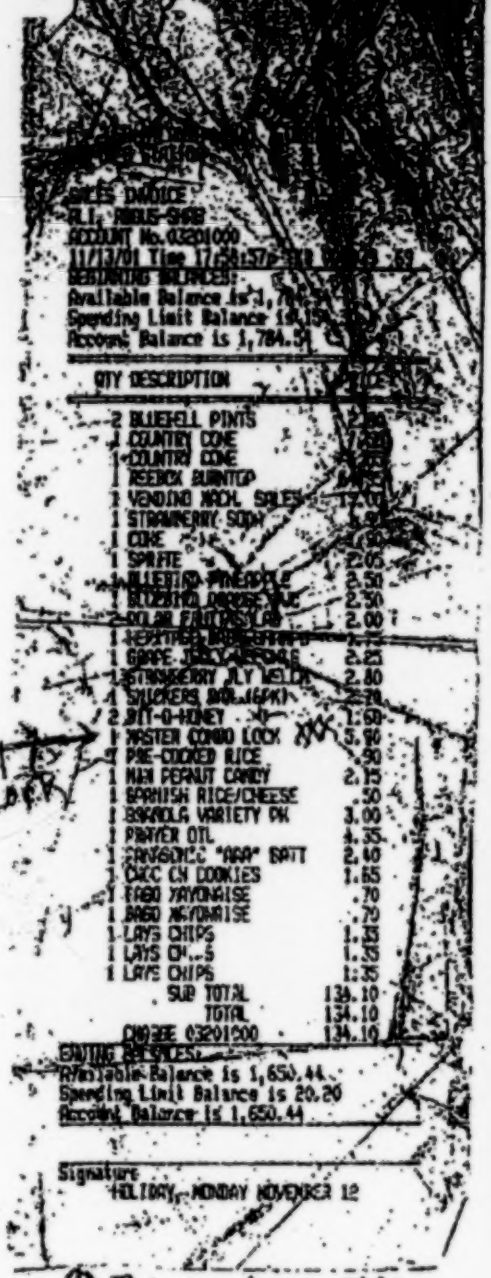
SALES INVOICE
RL1 RRRR5-5983
ACCOUNT No.03201000
11/13/01 Time 17:11:29 TXN 000017 83
BEGINNING BALANCES:
Available Balance is 221.59
Spending Limit Balance is 191.45
Account Balance is 2,283.59

QTY	DESCRIPTION	PRICE
1	BLUEBELL PINTS	1.40
1	STRAWBERRY SODA	2.05
1	SPRITE	2.05
1	COKE	2.05
1	DEL. SEARS, TED	2.75
1	FEISH STEAK SEASONING	2.55
1	VITAMIN C, 500MG	2.75
6	LEGAL ENVELOPE	.90
8	TUBULAR HANGERS	2.00
1	TANG	1.70
1	IRONSCREEN TOILETRY	2.49
1	LEGAL PADS	1.00
1	LEGAL PADS	1.00
1	LEGAL PADS	1.00
1	COUNTRYTIME RASPBERRY	1.65
1	CHOC CH COOKIES	1.65
1	SLATE GRAY PITCHER	2.65
1	BLUEBIRD ORANGE JUC	2.50
1	BLUEBIRD PINEAPPLE	2.50
1	BUTTER COOKIES	1.65
1	RUBBERMAID QT. BOWL	2.99
1	ZESTA SALTINES CRKR	2.05
1	SUGAR CUBES - BOX	1.45
1	SUGAR CUBES - HOT	1.49
1	TASTERS CHOICE	6.13
1	LOW FAT FIG BARS	2.63
1	REESE PEANUT BUTTER	2.10
1	COFFEEMAKER#1	1.85
1	SNICKERS BAR (6PK)	2.70
1	BUTT-NUT SOUP	1.60
1	TWIN SUGAR	1.55
1	MIRROR	2.10
1	LAYS CHIPS	1.35
1	CHILI W/BEANS	.85
1	STARLITE MINTS	.80
1	BEEF STEW	.90
1	GARLIC BULBS	.45
1	GARLIC BULBS	.45
1	TONE SKIN CARE	.85
1	VITAMIN E	3.40
1	HONEY	2.15
1	BAGD MAYONAISE	.70
1	LEMON PEANUT CANDY	2.70
1	BAGD LEMON PREMIUM	.65
1	MASTER COMBO LOCK	8.90
1	DEOD-STIC REG	1.15
1	SUP-TIP COT SWABS	.99
1	COCOA BUTTER STICK	2.40
1	BAR SOAP	.70
1	BABYOIL HERITAGE	1.30
	SUB TOTAL	85.25
	TOTAL	85.25
	CHARGE 03201000	85.25

ENDING BALANCES:
Available Balance is 177.00
Spending Limit Balance is 91.20
Account Balance is 2,652.99

Signature
BLESSED FOR INVENTORY PURPOSES

This slip shows that Claimant on 8/21/01 did purchase clothes hangers which were missing. Also a Mirror was purchased and was also missing from property on arrival at USP-Big Sandy. Also another Lock was purchased on this date



SALES INVOICE
RL1 RRRR5-5983
ACCOUNT No.03201000
11/13/01 Time 17:28:57 TXN [illegible]
BEGINNING BALANCES:
Available Balance is 1,784.59
Spending Limit Balance is 1,[illegible]
Account Balance is 1,784.59

QTY	DESCRIPTION	PRICE
2	BLUEBELL PINTS	2.80
1	COUNTRY COKE	2.05
1	COUNTRY COKE	2.05
1	REEBOK BURNTOP	84.99
1	VENDING MACH SALES	17.00
1	STRAWBERRY SODA	2.05
1	COKE	2.05
1	SPRITE	2.05
1	BLUEBIRD PINEAPPLE	2.50
1	BLUEBIRD ORANGE JUC	2.50
2	DOLLAR FAN PASTELS	2.00
1	KEYSTONE BAR SOAP 6-B	2.99
1	GOOSE JERKY ORIGINAL	2.25
1	STRAWBERRY JLY MELLO	2.80
4	SNICKERS BAR (6PK)	2.70
2	BUTT-O-HONEY	1.60
1	MASTER COMBO LOCK	5.90
2	PRE-COOKED RICE	.90
1	MIX PEANUT CANDY	2.15
1	GARNISH RICE/CHEESE	.50
1	BANANA VARIETY PK	3.00
1	PRAYER OIL	4.35
1	DEODORIZ "ODR" BATT	2.40
1	CHOC CH COOKIES	1.65
1	BAGD MAYONAISE	.70
1	BAGD MAYONAISE	.70
1	LAYS CHIPS	1.35
1	LAYS CH..S	1.35
1	LAYS CHIPS	1.35
	SUB TOTAL	134.10
	TOTAL	134.10
	CHARGE 03201000	134.10

ENDING BALANCES:
Available Balance is 1,650.44
Spending Limit Balance is 20.20
Account Balance is 1,650.44

Signature
HELIDAY, MONDAY NOVEMBER 12

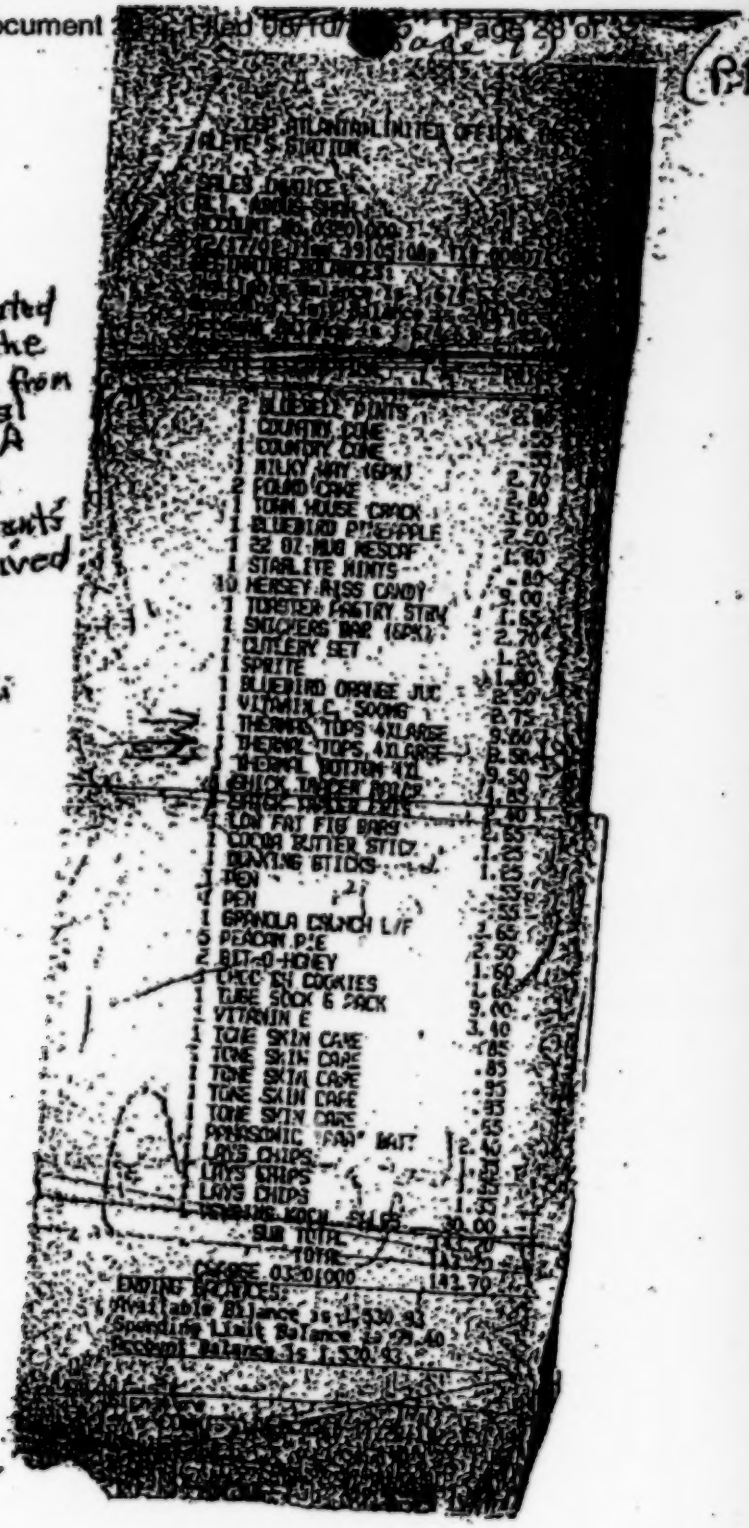
LOCK

This canteen slip shows that A Master Combonat Lock was purchased in the USP Atlanta Canteen on 11/13/01; it was missing from claimants property upon it arrival at USP-Big Sandy.

A.S.M.S.Ali

Note: This exhibit dated 12/17/01 shows that the claimant did purchase from the USP canteen Thermal Tops and and bottoms. A set of the same was missing from the Claimants Property when it arrived USP-Big Sandy!!!

-A.S.M.S.A.L.



PLAINTIFF'S EXHIBIT # 3

U.S. Department of Justice
Federal Bureau of Prisons
Southeast Region
Building 2000
3800 Camp Creek Parkway, SW
Atlanta, Georgia 30331-6226

March 2, 2004

Abdus-Shahid Ali
Reg. No. 03201-000
USP BSY
P. O. Box 2068
Inez, KY 41224

RE: Administrative Claim Receipt: #TRT-SER-2004-02083

Dear Claimant:

This acknowledges receipt of an administrative claim you are filing for alleged personal injury and/or damage to or loss of personal property. The claim was accepted for filing on February 20, 2004, by the agency involved in your alleged loss/injury.

The Government is afforded six months from the date the claim is receipted to make a determination regarding your claim. An answer to your claim will be mailed on or before August 18, 2004.

In order for us to properly investigate this claim, you will need to provide a complete copy of all records (do not send originals as they will not be returned) in your possession

relating to this claim as well as a detailed description of the events surrounding the alleged loss. **If you have previously provided this information, please disregard this portion of this notice.**

You are advised that failure to provide this information may result in delay in processing, or prejudice the outcome of your claim. Additionally, you are advised that it is your responsibility to keep this office apprised of your present address.

Sincerely,

/s/
for Lisa M. Sunderman
Regional Counsel

PLAINTIFF'S EXHIBIT # 4

U.S. Department of Justice
Federal Bureau of Prisons
Southeast Regional Office
3800 Camp Creek Parkway, SW
Building 2000
Atlanta, Georgia 30331-6226

August 11, 2004

RETURN RECEIPT
7000 0600 0024 8061 0604
Abdus-Shahid Ali
Reg. No. 03201-000
USMCFP SPG
P.O. Box 4000
Springfield, MO 65801-4000

RE: Administrative Tort Claim Number TRT-SER-2004-02083

Dear Claimant :

Your claim has been considered for administrative settlement under the Federal Tort Claims Act (FTCA), Title 28 United States Code (U.S.C.) Section 2672 et seq., and authority granted by Title 28 Code of Federal Regulations (C.F.R.) Section 0.172. You claim government liability in the amount of $177 as compensation for personal property loss.

Section 2672 of the FTCA delegates to each federal agency the authority to consider, determine and settle any claim for money damages against the United States for loss of

personal property or injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

You allege following your transfer from the United States Penitentiary (USP) in Atlanta, Georgia, on December 8, 2003, staff failed to mail all your personal property. You contend you are missing numerous items. You included a typewritten list of alleged missing items along with a personal property inventory record dated August 14, 2001 and a number of commissary receipts dated in 2001. We have reviewed your claim and reports from appropriate staff members. Our investigation reveals on December 18, 2003, January 29, 2007, March 24, 2004, you were issued your personal property at your current facility. You reviewed your personal property and signed Section 10 b. of the completed BP-383 form certifying the accuracy of the information. You did not inform staff of any discrepancies or missing personal property. Further, you failed to provide documentation you had any of the alleged missing items in your possession prior to your transfer in 2003.

Section 10 of Form BP-383 is a "Claim Release" which reads in pertinent part, " . . . The inmate by signing below certifies the accuracy of the inventory, except as noted on the form, relinquishing of all claim to articles listed as donated, receipt of allowable items, and receipt of a copy of the inventory. When the inmate claims a discrepancy in the inventory, the receiving officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments." By signing Section 10 a. you relinquished any future claim to the items now alleged to be missing.

Based on the above, there is no evidence to indicate that you have sustained an injury or loss caused by the negligent or wrongful act or omission of any Bureau of Prisons' employee acting within the scope of his or her employment. Therefore, your claim is denied.

You are advised that if you are dissatisfied with our determination in this matter, you are afforded six (6) months from the date of the mailing of this communication within which to bring suit in the appropriate United States District Court.

Sincerely,

/s/
FOR Lisa M. Sunderman
Regional Counsel

cc: Warden, USP ATL
ATTN: FTCA Coordinator

[CERTIFICATE OF SERVICE OMITTED]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1:04-CV-02986-ODE

[Filed January 27, 2006]

Abdus-Shahid M.S. Ali	)
Plaintiff	)
	)
v.	)
	)
United States, Federal Bureau	)
of Prisons, Harley Lappin, R.	)
Wiley, & Daniel Quinones	)
Defendants	)
	)

ORDER

This pro se action brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346 and 2671 et seq., the Religious Freedom Restoration Act of 1993 ("Religious Freedom Act"), 42 U.S.C. § 2000bb et seq., the Religious Land Use and Institutionalized Persons Act of 2000 ("Institutionalized Persons Act"), 42 U.S.C. § 2000cc et seq., and the First, Fourth, and Fifth Amendments to the United States Constitution[1] is currently before the Court on

[1] For ease of reference, the Court will refer to Plaintiff's constitutional claims as *Bivens* claims. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that injured plaintiffs can bring a cause of action for

Defendants' Renewed Motion to Dismiss [#21]. For the reasons discussed below, Defendants' Renewed Motion to Dismiss [#21] is GRANTED.

I. *Factual Background*

The following facts were taken from Plaintiff's Amended Complaint and are assumed to be true for purposes of ruling on the instant motion.

A. *Plaintiff's Lost Property*

Plaintiff is a Muslim, and his religious faith is Al-Islam. He currently is a federal prisoner at United States Penitentiary Big Sandy ("USP Big Sandy") in Inez, Kentucky. Plaintiff was a prisoner at United States Penitentiary Atlanta ("USP Atlanta") from August 1, 2001 to December 3, 2003. He was transferred from USP Atlanta to USP Big Sandy on December 3, 2003.

Before being transferred, prisoners must take their personal belongings to the prison's Receiving and Discharge Unit ("R&D Unit") so that their property may be inventoried, packaged, and sent to their new location. Plaintiff attempted to take his personal property to the R&D Unit at USP Atlanta on November 28, 2003. The officer in charge, Officer Daniel Quinones, told Plaintiff that he could not perform such a task because he was the only one on duty at the time. Officer Quinones told Plaintiff he would send for him when he had assistance in the R&D Office and could devote the time necessary to inventory and

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damages against federal officers for violation of constitutional rights).

package Plaintiff's property. On December 2, 2003 at 8 a.m., Officer Quinones called Plaintiff to the R&D Unit. Plaintiff waited there all morning. Officer Quinones again told Plaintiff that he was not available to inventory Plaintiff's property because he was the only one on duty. Officer Quinones told Plaintiff that if he left his property at the R&D Unit, he would "get to it in a day or so and . . . ship every thing . . . to USP Big Sandy." Am. Compl. ¶ 15. Plaintiff complied. He closed and locked the two duffle bags containing his property and left them in the R&D Unit with Officer Quinones. He was not present when his items finally were inventoried, packaged, and shipped on or around December 8, 2003.

Plaintiff was transferred to USP Big Sandy on December 3, 2003. According to Plaintiff, his duffle bags arrived at USP Big Sandy's R&D Unit on or about December 18 or 29, 2003.[2] Plaintiff noticed that some of his property was missing.

Staff at USA Big Sandy's R&D Unit told Plaintiff that he had to sign a form to receive his property. Plaintiff informed the R&D staff that some of his property was missing. Staff members told him "to sign for what he got because that was all that they had been sent. Plaintiff was informed that if some of his property was missing then he should file a Federal tor [sic] claim." *Id.* ¶ 34. Plaintiff signed for his property and began to record which items were missing. Plaintiff also reviewed the inventory slip filled out by Officer Quinones at USP Atlanta and

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[2] This may be a typographical error. Plaintiff may have meant December 18 or 19, 2003.

discovered that the missing property never was inventoried in Atlanta.

Many of the missing items were of religious and nostalgic significance to Plaintiff. Those items included the following:

QUANTITY	ITEM	VALUE
1	Holy Qur'an	$20.00
1	Pocket Holy Qur'an	$6.00
3	Books of $.37 Stamps	$22.20
6	$.50 Stamps	$3.00
3	$.80 Stamps	$2.40
2	Trac II Razor	$5.95
1	Pack of Trac II Blades	$3.00
1	Watch Battery	$2.20
1	Mirror	$2.20
8	Color Markers	$7.50
10	Wash Cloths	$4.00
1	Prayer Rug	$20.00
1	Masterlock	$6.10
1	Thermal Top	$9.90
1	Thermal Bottom	$9.90
2	Packs Tube Socks	$18.80
5	Clothes Hangers	$1.25
1	Atlanta Commissary Card with $7.00 on it	$7.00
	TOTAL VALUE	$177.00

Am. Compl. Ex. 2, p. 4. Plaintiff also states that "several bottles of oils" and five religious magazines titled "Al-Jumu'ah,"[3] were missing from his duffel bags.

B. *Discrimination on the Basis of Religion*

According to Plaintiff, the Federal Bureau of Prisons and its employees have discriminated against him on the basis of religion:

> That upon information and belief Muslim inmates especially since September 11, 2001 have been subjected to very hard times and bad treatment at the hands of both [Federal Bureau of Prison], State and Local prison employees. Reports from all over the Country have come in on the ir (Muslims)'s) [sic] property, especially religious property has been destroyed, confiscated, looted, lost stolen or taken without cause or justifications. These conditions takes [sic] on an Islamiaphobia (harassment) attitude.

Id. ¶ 23. Plaintiff also alleges that contempt for his religion was the reason that his property was not properly transferred to USP Big Sandy, claiming that it was intentionally destroyed:

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[3] Plaintiff admits that the Federal Bureau of Prisons has a policy on "not transferring magazines and newspapers, however, if the Plaintiff is not their [sic] to sent [sic] those items home, they should [sic] be mailed on the the [sic] receiving institution, and allow them to deal with the issues. . . . They should never just confiscate a persons [sic] property and do as they please with it." Am. Compl. ¶ 24.

> The Plaintiff is a Sunni Muslim and over the years have practiced his faith to the fullest. This have [sic] earned him much harassment, via., prison official confisation [sic] and distruction [sic] of both his legal and religious property time after time. It seem [sic] as though the many prison employees think that they can hurt you best taking your personally owned property . . . This have been the case in both the [District of Columbia Department of Corrections] system and the [Bureau of Prisons] . . . It is a matter of record that this form of harassment has continued with me year after year.

Id. ¶ 40.

C. *Procedural History*

Plaintiff filed an administrative claim through the Bureau of Prisons on December 30, 2003 with the Southeast Regional Office Director to recover the value of his lost items. On March 2, 2004, Plaintiff received a letter acknowledging his claim and informing him that the "Government is afforded six months from the date the claim is receipted to make a determination." *Id.* Ex. 3. On August 11, 2004, he received another letter from the Southeast Regional Office of the Federal Bureau of Prisons, indicating the following:

> Our investigation reveals on December 18, 2003, January 29, 2004, and March 24, 2004, you were assigned your personal property at your current facility. You reviewed your personal property and signed Section 10 b. of the completed BP-383 form certifying the accuracy of the information. You did not inform staff of any discrepancies or missing

> personal property. Further, you failed to provide documentation you had any of the alleged missing items in you possession prior to your transfer in 2003.
>
> . . .
>
> Based on the above, there is no evidence to indicate that you have sustained an injury or loss caused by the negligent or wrongful act or omission of any Bureau of Prisons' employee acting within the scope of his or her employment. Therefore, your claim is denied.

Id. Ex. 4, pp. 1-2.

Plaintiff filed this action on October 12, 2004 against the Federal Bureau of Prisons, Harry Lappin (Director of the Federal Bureau of Prisons), R. Wiley (Warden at USP Atlanta), Officer Quinones, and R.E. Holt (Southeast Regional Director for the Federal Bureau of Prisons). Defendants' original Motion to Dismiss [#19] related to this Complaint. After Defendants filed said motion, Plaintiff filed an Amended Complaint on August 10, 2005, removing Mr. Holt and adding the United States as a Defendant. Defendants renewed their Motionn to Dismiss [#21], which the Court addresses below.

Count I asserts a claim under the Federal Tort Claims Act (presumably to recover the value of his lost property),[4]

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[4] Considering the latitude generally afforded pro se plaintiffs, *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1161 (11th Cir. 1993), the Court will assume that Plaintiff seeks to recover the value of

as well as violations of the Religious Freedom Act and Institutionalized Persons Act. Count II seems to reassert the claims in Count I and additionally asserts violations of the First, Fourth, and Fifth Amendments. Plaintiff seeks compensatory damages in the amount of $125,000 from the United States and $50,000 from each individual defendant, $30,000 in punitive damages from each individual defendant, costs, and injunctive relief.

II. *Defendants' Renewed Motion to Dismiss*

A. *Standard for Motion to Dismiss*

Federal Rule of Civil Procedure 12(b)(1) empowers the Court to dismiss claims for lack of jurisdiction over the subject matter. Under Federal Rule of Civil Procedure 12(b)(6), the Court may grant a defendant's motion to dismiss when a complaint fails to state a claim upon which relief can be granted. The pleadings are construed broadly so that all well-pleaded facts[5] are accepted as true, and all inferences are viewed in a light most favorable to the plaintiff. *Cooper v. Pate,* 378 U.S. 546, 546 (1964); *Conner v. Tate,* 130 F. Supp. 2d 1370, 1373 (N.D. Ga. 2001). A motion to dismiss should only be granted when "it appears

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his lost property despite the fact that his Prayer for Relief does not make such a request.

[5] In contrast to alleged "facts," a district court is not required to accept conclusory allegations or unwarranted factual deductions as true. *Purvis v. City of Orlando,* 273 F. Supp. 2d 1321, 1324 (M.D. Fla. 2003). Likewise, the court need not "accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain,* 478 U.S. 265, 286 (1986); *see also Purvis,* 273 F. Supp. 2d at 1324.

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see Linder v. Portocarrero,* 963 F.2d 332 (11th Cir. 1992).

When resolving such a motion, the Court is typically constrained to look only to the pleadings and exhibits incorporated therein. Fed. R. Civ. P. R. 10(c), 12(b). The United States Court of Appeals for the Eleventh Circuit, however, has additionally permitted reference to a document attached to a motion to dismiss but only where the attached document is "central to the plaintiff's claim" and is "undisputed" in the sense that "the authenticity of the document is not challenged." *Horsley v. Feldt,* 304 F.3d 1125, 1134 (11th Cir. 2002); *see also Day v. Taylor,* 400 F.3d 1272, 1276 (11th Cir. 2005) (same).

B. *Plaintiff's Claim Under the Federal Tort Claims Act*

Defendants argue that Plaintiff's FTCA claim is barred by the doctrine of sovereign immunity and must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

In enacting the FTCA, Congress waived sovereign immunity and made the United States liable "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b). United States district courts have original jurisdiction over such actions. *Id.* § 1346(a). Congress excluded certain types of claims from the FTCA, retaining sovereign immunity with respect to those exclusions. The exclusion relevant to this lawsuit covers "any claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs or

excise or any other law-enforcement officer." 28 U.S.C. § 2680(c).

The relevant issue is whether the exclusion in § 2680(c) applies to losses arising from a detention of property. Defendants attached as an exhibit to their Motion to Dismiss the unpublished opinion of the United States Court of Appeals for the Eleventh Circuit in *Agunbiade v. Federal Bureau of Prisons,* No. 02-11353 (11th Cir. Sept. 23, 2002). The facts in *Agunbiade* are virtually identical to the facts now before this Court. Agunbiade was a prisoner at USP Atlanta who was being transported to a federal correction institution in Minnesota. Employees for the Federal Bureau of Prisons were responsible for transferring his property to Minnesota, and certain items were lost en route. The Court held that the district court did not err "in finding that the [Bureau of Prisons] and USP-Atlanta employees had detained Agunbiade's property within the meaning of 28 U.S.C. § 2680(c)." Therefore, Agunbiade's claim against the United States was not authorized by the FTCA.

Plaintiff's case is factually equivalent to *Agunbiade.* Although the Court is not bound to reach the same outcome,[6] it does find that *Agunbiade* is persuasive authority for holding that Plaintiff's claim falls within the exclusion to the FTCA in § 2680(c).[7] Therefore, it is barred

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[6] "Unpublished opinions are not considered binding precedent." 11th Cir. R. 36-2.

[7] The Court notes that other federal courts are in accord with this outcome. *See, e.g., Kosak v. United States,* 465 U.S. 848, 854 (1984) ("[W]e think that the fairest interpretation of the crucial portion of the provision is the one that first springs to mind: 'any claim arising in respect of the detention of goods means any claim

by the doctrine of sovereign immunity and must be dismissed for lack of subject matter jurisdiction.

C. *Plaintiff's Other Claims*

Defendants assert that Plaintiff's claims under the Religious Freedom Act, Institutionalized Persons Act, and *Bivens* should be dismissed because Plaintiff has not exhausted his administrative remedies as required by the Prison Litigation Reform Act of 1995.

The Prison Litigation Reform Act of 1995 provides that "[n]o action shall be brought . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The exhaustion requirement applies to FTCA claims and *Bivens* claims, as well as claims under the Religious Freedom Act, the Institutionalized Persons Act,

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'arising out of' the detention of goods, and includes a claim resulting from negligent handling or storage of detained property."); *Parmelee v. Carlson*, 77 F.3d 486 (8th Cir. 1996) (table case) ("Parmelee's suit arises out of the detention of his property, notwithstanding the subsequent alleged loss of his property."); *Bramwell v. United States Bureau of Prisons*, 348 F.3d 804, 807 (9th Cir. 2003) (holding that a claim for damaged glasses resulting from detention of plaintiff's coat was excluded by § 2680(c)); *see also Haughton v. Fed. Bureau of Investigation*, 1999 U.S. Dist. LEXIS 19031, *17 (S.D.N.Y. 1999); *United States v. Chambers*, 92 F. Supp. 2d 396, 401 (D.N.J. 2000); *Johnson v. United States*, 2000 U.S. Dist. LEXIS 9815, *8 (D. Kan. 2000); *Wilson v. U.S.*, 2001 U.S. Dist. LEXIS 9652 *5, (D. Kan. 2001). *But see Alliance Assurance Co. v. United States*, 252 F.2d 529, 534 (2d Cir. 1958) ("The conclusion is inescapable that [Congress] did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others."); *A&D Int'l, Inc. v. United States*, 665 F.2d 669 (Former 5th Cir. 1982).

and all other federal and constitutional claims. *See McNeil v. United States,* 508 U.S. 106, 107 (1993) (FTCA claims); *Alexander v. Hawk,* 159 F.3d 1321, 1324 (11th Cir. 1998) (*Bivens* claims); *Cutter v. Wilkinson,* 125 S. Ct. 2113, 2123 n.12 (2005) (noting that the exhaustion requirement in the Prison Litigation Reform Act § 1997e applies to claims under the Institutionalized Persons Act).

The administrative remedy scheme in the Federal Bureau of Prisons provides three tiers for handling grievances: (1) a request to the Warden; (2) an appeal to the Regional Director; and (3) an appeal with the General Counsel for the Federal Bureau of Prisons. Only after pursuing all three tiers within the prescribed time limits may a Plaintiff file a federal claim in district court. While Plaintiff has alleged – and Defendants concede – that Plaintiff exhausted his administrative remedies for his FTCA claim, Defendants submit evidence showing that Plaintiff has not exhausted his administrative remedies for the other claims. They proffer the unsworn declaration of Clinton Stroble, Assistant Regional Counsel for the Southeast Regional Offices of the Federal Bureau of Prisons, which indicates that Plaintiff has not exhausted his administrative remedies with respect to these claims:

> Plaintiff has not exhausted his administrative remedies regarding the claims raised in his Complaint. Plaintiff has filed approximately 10 administrative remedies at various levels. Of the 10 administrative remedies, only three relate to any religious matter. The Plaintiff filed Request for Administrative Remedy 271586-F1, regarding him his [sic] he was denied Jumuah Prayer Service. This request was received on or about July 1, 2002. On or about August 2, 2002, the Plaintiff was provided an

> explanation and the claim was closed. The Plaintiff did not appeal this administrative remedy. The Plaintiff Request for Administrative Remedy 371777-F1, on or about March 31, 2005, raising numerous claims regarding religious beliefs. None of the matters raised in this administrative remedy related to the claims he raised in this instant action. On or about April 22, 2005, the Plaintiff's administrative remedy was denied. The Plaintiff appealed this decision by filing Regional Administrative Appeal 371777-R1 on or about June 13, 2005. This appeal was rejected on or about June 17, 2005, because it had too many continuation pages and it was also filed in the wrong Regional Office. There is no evidence the Plaintiff has taken any further appeal of this administrative remedy.

Defs.' Mem. Supp. Mot. to Dismiss Ex. 1, pp. 2-3.

In his Opposition to Defendant's Motion, Plaintiff seems to argue that Defendants misled him to believe that by filing an administrative claim for the loss of his property, he satisfied the exhaustion requirement with respect to all possible claims (including the claims under the Religious Freedom Act, Institutionalized Persons Act, and *Bivens*). Plaintiff was told that "when you file a FTCA-standard form '95', you do not have [sic] exhaust your general administrative remedy." Pl.'s Resp. to Defs.' Mot. to Dismiss ¶ 13. Plaintiff cites a case from the Western District of New York, which held that exhaustion may not be required when prison guards or other officials mislead a prisoner into believing that he had taken all the appropriate steps to pursue his claims in federal court. *Lane v. Doan*, 287 F. Supp. 2d 210, 212 (W.D.N.Y. 2003). However, *Lane* and the cases upon which it relies are

inapposite to Plaintiff's situation. The statement made to Plaintiff about filing a standard-form 95 specifically related to his FTCA claim. That statement was true, and Plaintiff indeed exhausted his administrative remedies with respect to that claim. However, Plaintiff does not allege that he was told that the standard form 95 also exhausted his administrative remedies with respect to his other claims. Therefore, even if the Court were to adopt the holding in *Lane,* Plaintiff does not establish the existence of a misrepresentation that would excuse having to exhaust his administrative remedies on his other claims.

Plaintiff also argues that it would be inefficient to dismiss without prejudice his unexhausted claims, only to hear them again after Plaintiff exhausts his remedies at some point in the future. Plaintiff's concern with efficiency is flawed for two reasons. First, Plaintiff seems to miss the point of the exhaustion requirement. As explained by the Eleventh Circuit, the rationale for requiring exhaustion is seven-fold:

> (1) to avoid premature interruption of the administrative process; (2) to let the agency develop the necessary factual background upon which decisions should be based; (3) to permit the agency to exercise its discretion or apply its expertise; (4) to improve the efficiency of the administrative process; (5) to conserve scarce judicial resources, since the complaining party may be successful in vindicating rights in the administrative process and the courts may never have to intervene; (6) to give the agency a chance to discover and correct its own errors; and (7) to avoid the possibility that "frequent and deliberate flouting of the administrative processes

> could weaken the effectiveness of an agency by encouraging people to ignore its procedures."

Alexander, 159 F.3d at 1327 (quoting *Kobleur v. Group Hospitalization & Med. Svcs., Inc.*, 954 F.2d 705 (11th Cir. 1992)). Thus, while a dismissal without prejudice may seem inefficient to Plaintiff in the short-run, adhering to the exhaustion requirement accomplishes the long-term efficiency goals announced in *Alexander* and *Kobleur*. Second, there are situations when a dismissal without prejudice for failure to exhaust will effectively bar a prisoner's claim. For instance, if the time to file a grievance or to appeal an administrative ruling lapses while a prisoner's case is pending in district court, a dismissal without prejudice will be the end of the matter. In this hypothetical situation, it would be impossible for the prisoner to perfect his right to refile the action in district court.

The Court finds that Plaintiff has not exhausted his administrative remedies with respect to his claims under the Religious Freedom Act, Institutionalized Persons Act, and *Bivens* and dismisses them without prejudice.

III. *Conclusion*

For the foregoing reasons, Defendants' Renewed Motion to Dismiss [#21] is GRANTED. The Court dismisses with prejudice Plaintiff's claim under the Federal Tort Claims Act, and it dismisses without prejudice Plaintiff's other claims under the Religious Freedom Act, Institutionalized Persons Act, and *Bivens*.

SO ORDERED, this 26 day of January, 2006.

/s/

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-11468
Non-Argument Calendar

[Filed October 19, 2006]

[DO NOT PUBLISH]

ABDUS-SHAHID M.S. ALI,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
FEDERAL BUREAU OF PRISONS,	)
MR. LIPPIN, Dicrector of F.B.O.P,	)
WARDEN R. WILEY, U.S.P. Atlanta	)
MR. QUN'ANIS,	)
UNITED STATES,	)
Defendants-Appellees,	)
	)
SOUTHEAST REGIONAL DIRECTOR,	)
Defendant.	)
	)

D.C. Docket No. 04-02986-CV-ODE-1

Appeal from the United States District Court
for the Northern District of Georgia

Before ANDERSON, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

Appellant Abdus-Shahid M.S. Ali ("Ali") appeals the district court's dismissal of his civil action brought pursuant to: (1) the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346 and 2671 *et seq.*; (2) the Religious Freedom Restoration Act of 1995 ("RFRA"), 42 U.S.C. 2000bb *et seq.*; (3) the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUA"), 42 U.S.C. § 2000cc *et seq.*; (4) and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395, 91 S.Ct. 1999, 2004, 29 L.Ed.2d 619 (1971). According to his complaint, Ali was transferred from a federal prison in Atlanta, Georgia to a prison in Inez, Kentucky. Ali discovered upon his arrival in Kentucky that several religious and personal items were missing from his belongings. After the Federal Bureau of Prisons ("BOP") rejected Ali's administrative claim under the FTCA, Ali filed suit in federal court. The district court dismissed Ali's FTCA claim for lack of subject matter jurisdiction because the United States did not waive sovereign immunity; the court dismissed Ali's non-FTCA claims for lack of exhaustion of administrative remedies. On appeal, Ali argues that the prison officers who mishandled his belongings do not fall within an exception to the waiver of sovereign immunity for FTCA claims. Ali also argues that the district court erred in failing to convert the defendants' motion to dismiss into a motion for summary judgment.

We review *de novo* the grant of a motion to dismiss for want of subject matter jurisdiction. *Milan Express, Inc. v. Averitt Express, Inc.*, 208 F.3d 975, 978 (11th Cir. 2000). In determining whether subject matter jurisdiction exists, a court is permitted to investigate widely and has authority to look beyond the pleadings. *Lawrence v. Dunbar*, 919 F.2d

1525, 1529 (11th Cir. 1990) (stating that a court may review matters outside the pleadings, including testimony and affidavits).

First, Ali argues on appeal the district court erred in dismissing his FTCA claim because the court interpreted the exclusion to the FTCA found under 28 U.S.C. 2680(c) too broadly. The FTCA provides a waiver of the United States' sovereign immunity to suits for damages attributed to its employees acting within the scope of their employment, if said employees would be liable to the claimant individually under the law of the *situs* . 28 U.S.C. § 1346(b)(1). Congress has promulgated a number of exceptions to this waiver of sovereign immunity, including 28 U.S.C. § 2680(c), which exempts "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or *any other law enforcement officer*." (emphasis added).

The United States Supreme Court has interpreted § 2680(c) broadly to cover not only damages arising from the detention of goods or merchandise, but also situations in which damages result from their negligent storage or handling. *Kosak v. United States*, 465 U.S. 848, 854-59, 104 S. Ct. 1519, 1523-25, 79 L. Ed. 2d 860 (1984). The definition of "any other law-enforcement officer," within the meaning of § 2680(c) has been addressed by this circuit and sister circuit courts of appeal. *Schlaebitz v. United States Dep't of Justice*, 924 F.2d 193 (11th Cir. 1991). In *Schlaebitz*, we held that U.S. Marshals, who were allegedly negligent in releasing a parolee's luggage to a third party, were "law-enforcement officers" within the meaning of the FTCA exception in § 2680(c). 924 F.2d at 195; *see also United*

States v. Potes Ramirez, 260 F.3d 1310, 1315-16 (11th Cir. 2001).

After reviewing the record, we conclude that the district court did not err in finding that the officers who handled Ali's property fall within the exception found in 28 U.S.C. § 2680(c). *See Schlaebitz*, 924 F.2d at 194-95. Accordingly, the district court did not err in dismissing Ali's FTCA claim for want of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

Next, Ali argues on appeal the district court should have turned the motion to dismiss into a motion for summary judgment because the district court considered materials that the defendant had submitted outside of the complaint. Ali argues that had he been given notice of a motion for summary judgment, he would have submitted additional affidavits or other evidence to counter the defendants' position.

We review *de novo* a district court's dismissal of a prisoner's action for failure to comply with the exhaustion requirements of 42 U.S.C. § 1997e(a). *Higginbottom v. Carter*, 223 F.3d 1259, 1260 (11th Cir. 2000). Pursuant to § 1997e(a), "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." A civil action with respect to "prison conditions" means "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2); *Higginbottom*, 223 F.3d at 1260.

We have explained that "Congress now has mandated exhaustion in section 1997e(a) and there is no longer discretion to waive the exhaustion requirement. . . . [E]xhaustion is now a *pre-condition* to suit . . . ." *Alexander v. Hawk*, 159 F.3d 1321, 1325-26 (11th Cir. 1998) (emphasis added); *see also Leal v. Georgia Department of Corrections*, 254 F.3d 1276, 1279 (11th Cir. 2001) (same). We have also concluded that "[a] claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted." *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998).

Here, Ali failed to provide any information that would indicate he exhausted the administrative remedies for his non-FTCA claims. Therefore, Ali's claims are "tantamount" to claims that "fail to state a claim upon which relief may be granted" because Ali failed to "allege the requisite exhaustion of remedies" for his non-FTCA claims. *See Rivera*, 144 F.3d at 731.

Lastly, Ali alleged below and on appeal that he would have exhausted his administrative remedies if prison officials had not misled him into thinking he only needed to file one claim form in order to pursue both his FTCA and non-FTCA claims. The district court recognized this argument and proceeded to find that "[t]he statement made to Plaintiff about filing a standard-form 95 specifically related to his FTCA claim." The question arises of whether the district court's treatment of Ali's statements were more akin to the analysis for a summary judgment motion. If so, we must decide whether the exhaustion requirements under the PLRA can be waived if a prisoner is misled into believing he has satisfied administrative procedures.

On review of a motion to dismiss, we will accept all allegations in the complaint as true and construe facts in a light most favorable to the plaintiff. *Harper v. Thomas*, 988 F.2d 101, 103 (11th Cir. 1993). A complaint should not be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1022 (11th Cir. 2001) (*en banc*).

After reviewing the record, we conclude that it is unclear whether Ali was in fact misled by prison officials which may excuse the exhaustion requirement. Therefore, we vacate the district court's dismissal of Ali's non-FTCA claims and remand this case for the district court to decide this issue in the first instance.

AFFIRMED in part, VACATED in part, and REMANDED.

FILED
JUL 31 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-9130

In the Supreme Court of the United States

ABDUS-SHAHID M.S. ALI, PETITIONER,

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a prisoner's claim under the Federal Tort Claims Act that prison guards mishandled his property during an inter-prison transfer is barred by 28 U.S.C. 2680(c), which precludes the government's liability in tort for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."

PARTIES TO THE PROCEEDINGS

Petitioner is Abdus-Shahid M.S. Ali.

Respondents are the Federal Bureau of Prisons (BOP); Harley Lappin (Director of the BOP), R. Wiley (Warden of United States Penitentiary in Atlanta (USP Atlanta)), Daniel Quinones (Inmate Systems Officer at USP Atlanta), and the United States.

R.E. Holt (Director of the Southeast Region of BOP) was originally named as a defendant in the district court but was removed in petitioner's amended complaint, was not an appellee in the court of appeals, and is not a respondent here.

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IN THE

Supreme Court of the United States

No. 06-9130

ABDUS-SHAHID M.S. ALI, PETITIONER

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The unreported opinion of the court of appeals (JA 57-62) is available at 204 Fed. Appx. 778. The unreported order of the district court (JA 41-56) is available at 2005 WL 1079299.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2006. On January 17, 2007, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 8, 2007. The petition for a writ of certiorari was filed on January 25, 2007, and granted on May 29, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, are set forth in an appendix to this brief.

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, generally waives the United States' sovereign immunity for suits seeking damages "for injury or loss of property * * * caused by the negligent or wrongful act or omission" of employees of the federal government, 28 U.S.C. 1346(b), "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674. This "broad waiver of sovereign immunity" is cabined by thirteen exceptions set forth in 28 U.S.C. 2680.[1] *Smith v. United States*, 507 U.S. 197, 206-07 (1993). If one of the exceptions applies, the bar of sovereign immunity remains. The subsection at issue in this case is § 2680(c), which exempts from that waiver of immunity "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."[2]

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[1] For example, there are exceptions for claims involving the mishandling of mail (§ 2680(b)), the imposition or establishment of a quarantine (§ 2680(f)), damages caused by the fiscal operations of the Treasury or by regulation of the monetary system (§ 2680(i)), the combatant activities of the military (§ 2680(j)), the activities of the Tennessee Valley Authority or the Panama Canal Company (§§ 2680(*l*) and (m)), and the activities of federal land banks (§ 2680(n)).

[2] Before Congress' enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202, the exception provided that the FTCA does not apply to a claim arising out of the detention of "any goods or merchandise." 28 U.S.C. 2680(c) (1994). CAFRA struck from § 2680(c) the words "any goods or merchandise" and inserted "any goods, merchandise, or other property" in their stead. CAFRA § 3(a)(1), 114 Stat. at 211. CAFRA also added to

2. Petitioner is a prisoner in the custody of the United States Bureau of Prisons (BOP). Until recently, he was incarcerated at United States Penitentiary Big Sandy (USP Big Sandy) in Inez, Kentucky. He was transferred there on December 3, 2003, after spending twenty-eight months at United States Penitentiary Atlanta (USP Atlanta). JA 42.

Before being transferred, petitioner put his property in two duffel bags and brought them to USP Atlanta's Receiving and Discharge Unit (R&D Unit), where the property was to be inventoried, packaged, and sent to USP Big Sandy. See *BOP Program Statement No. 5800.12, Receiving and Discharge Manual*, ch. 4 (Dec. 31, 1997) <http://www.bop.gov/policy/progstat/5800_012.pdf>. Due to insufficient staffing at the R&D Unit, its officer in charge, respondent Daniel Quinones, told petitioner to leave his property with him at the R&D Unit and that he would "get to it in a day or so and ship everything to USP Big Sandy." JA 43. Petitioner complied. He closed and locked the two

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the end of § 2680(c) a provision which waives the United States' sovereign immunity for certain seizures of property made in connection with asset forfeiture laws. It specifically provides that the government's immunity *is* waived for:

> any claim-based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—
>
> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> (2) the interest of the claimant was not forfeited;
>
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

CAFRA § 3(a)(3), 114 Stat. at 211.

duffle bags and left them in the R&D Unit with respondent Quinones. He was not present when his items finally were inventoried, packaged, and shipped to USP Big Sandy on or about December 8, 2003. *Ibid.*

When petitioner's duffle bags were returned to him at USP Big Sandy's R&D Unit, he noticed that several religious and personal items were missing and so informed the R&D staff.[3] Staff members told him "to sign for what he got because that was all that they had been sent." *Ibid.* Petitioner was also "informed that if some of his property was missing then he should file a Federal tor [sic] claim" and was given the standard Form 95 for property claims. *Ibid.* Petitioner did as he was told. He signed for his property and recorded the missing items. He also reviewed the inventory slip filled out by respondent Quinones at USP Atlanta and discovered that respondent Quinones had not inventoried the missing items. *Id.* at 43-44.

3. Petitioner filed an administrative tort claim with the BOP's Southeast Regional Office Director on December 30, 2003, to recover the value of his missing items.[4] *Id.* at 46.[5] On August 11, 2004, petitioner received a letter from the Southeast Regional Office, stating that his administrative tort claim was denied and advising him that if "dissatisfied" with the denial, he was "afforded six (6) months from the

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[3] The district court provided a specific list of items missing from petitioner's property. JA 44.

[4] Respondents concede that petitioner exhausted his FTCA administrative remedies. JA 52.

[5] See also 28 C.F.R. 543.31 ("You may file a [Federal Tort Claims Act claim with the BOP] if you are * * * the owner of * * * damaged or lost property."); *BOP Program Statement No. 1320.06, Federal Tort Claims Act* § 7(a) (Aug. 1, 2003) <http://www.bop.gov/policy/progstat/1320_006.pdf> ("A claim may be filed by an inmate.").

date of the mailing of [the denial] within which to bring suit in the appropriate United States District Court."[6] JA 40.

4. Consistent with the BOP's advisement that petitioner could bring suit, petitioner filed this action on October 12, 2004, alleging that respondents were liable under the FTCA for the value of his lost property.[7] *Id.* at 41, 47. Notwithstanding the BOP's invitation to file suit, respondents promptly moved to dismiss petitioner's FTCA claim on the basis that it "is barred by the doctrine of sovereign immunity." *Id.* at 49. The district court agreed and dismissed the claim with prejudice. It held that "the [Bureau of Prisons] and USP-Atlanta employees had detained [petitioner's] property within the meaning of 28 U.S.C. § 2680(c)." *Id.* at 50. Because petitioner's FTCA claim was "not authorized by the FTCA," the court reasoned, it was "barred by the doc-

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[6] This advisement is consistent with the BOP's relevant regulation and program statement. See 28 C.F.R. 543.32 ("If you are dissatisfied with the [BOP's] final agency action, you may file suit in an appropriate U.S. District Court as no further administrative action is available."); accord, *BOP Program Statement No. 1320.06, supra*, § 8(g).

[7] Petitioner also brought claims (which are not before this Court, see Pet. 6-7 n.5, 25-26; U.S. Cert. Br. 11-13 & n.7) alleging that respondents violated his rights under (1) the Religious Freedom Restoration Act of 1995, 42 U.S.C. 2000bb *et seq.*; (2) the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*; and (3) the First, Fourth, and Fifth Amendments to the United States Constitution. JA 41 & n.1, 48, 58. The district court dismissed these claims without prejudice on the basis that petitioner failed to exhaust his administrative remedies, as required by the Prison Litigation Reform Act, 42 U.S.C. 1997e(a). *Id.* at 51-55. The court of appeals vacated the dismissal of the claims and remanded them to the district court. *Id.* at 60-62. Following this Court's grant of certiorari, the district court "administratively closed" the proceedings on remand pending this Court's review of petitioner's FTCA claim. *Ali v. Bureau of Prisons*, No. 1:04-CV-2986-JFK (N.D. Ga. June 5, 2007) (order procedurally terminating case).

trine of sovereign immunity and must be dismissed for lack of subject matter jurisdiction." *Id.* at 50-51.

5. The court of appeals affirmed. *Id.* at 58-60. The court held that "the officers who handled [petitioner's] property fall within the [detention of goods] exception found in 28 U.S.C. § 2680(c)" and that the district court properly dismissed petitioner's FTCA claim "for want of subject matter jurisdiction." *Id.* at 60. In so holding, the court followed its prior decision in *Schlaebitz v. Department of Justice*, 924 F.2d 193, 195 (CA11 1991) (*per curiam*). *Ibid.* In that case, the court held that United States Marshals, who were allegedly negligent in releasing a parolee's luggage to a third party, were "law-enforcement officers" under § 2680(c) and that the United States was consequently immune. *Schlaebitz*, 924 F.2d at 195. The court expressly refused to "construe the phrase 'or any other law enforcement officer' as supplementing the tax and customs context of the exception," such that the exception would be limited to "other officials assisting the customs or tax collection." *Id.* at 194. Instead, the court found persuasive the holdings of other courts of appeals – holdings with which four other courts of appeals now disagree[8] – that the term "'other law enforcement officer' may include officers in other agencies performing their proper duties" that involve detaining, storing, or

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[8] Compare *Chapa v. Department of Justice*, 339 F.3d 388, 390 (CA5 2003) (*per curiam*); *Cheney v. United States*, 972 F.2d 247, 248 (CA8 1992) (*per curiam*); *Bramwell v. Bureau of Prisons*, 348 F.3d 804, 807 (CA9 2003), cert. denied, 543 U.S. 811 (2004); *Hatten v. White*, 275 F.3d 1208, 1210 (CA10 2002); JA 60; *Schlaebitz*, 924 F.2d at 195; and *Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (CAFC 1988) (all holding that the exception applies to law enforcement officers acting in any capacity), with *Andrews v. United States*, 441 F.3d 220, 222-28 (CA4 2006); *Kurinsky v. United States*, 33 F.3d 594, 598 (CA6 1994), cert. denied, 514 U.S. 1082 (1995); *Dahler v. United States*, 473 F.3d 769, 771-72 (CA7 2007) (*per curiam*); and *Bazuaye v. United States*, 83 F.3d 482, 486 (CADC 1996) (all holding that the exception applies to only law enforcement officers acting in a customs or tax capacity).

handling a person's property even if there is no nexus to customs or tax enforcement. *Id.* at 194-95.

6. On May 29, 2007, this Court granted certiorari to resolve the conflict among the circuits. 127 S. Ct. 2875 (2007).

SUMMARY OF ARGUMENT

Section 2680(c)'s exception from FTCA liability of "[a]ny claim arising in respect of * * * the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer" does not bar petitioner's claim for the value of property lost by federal prison officials. A careful analysis of the exception's text, context, legislative history, and underlying purpose establishes that Congress did not intended the exception's detention of property clause to broadly bar claims against law enforcement officers, like federal prison officials, without a nexus to customs or tax enforcement.

I. The text of § 2680(c) does not bar claims arising from detentions outside the customs and tax contexts. Statutory language must be read in light of its surroundings to avoid giving it unintended breadth. Congress' focus on revenue collection in § 2680(c) is manifest. In addition to immunizing "the detention of goods" and "merchandise" "by any officer of customs or excise," it also immunizes "the assessment or collection of any tax or customs duty." The related *noscitur a sociis* and *ejusdem generis* canons account for that focus by acknowledging that § 2680(c)'s superficially broad phrase "any other law enforcement officer" must be "known by its companions" and "of the same sort" as "officer[s] of customs or excise." In other words, the canons compel the conclusion that Congress employed the term "any other law enforcement officer" in § 2680(c)'s detention clause to describe not law enforcement officers generally, but instead non-customs and non-tax officers acting in a revenue collection capacity. This narrow reading is also compelled by the rule against superfluities because an all-

inclusive reading of "any * * * law enforcement officer" would subsume and, therefore, render inoperative "officer[s] of customs or excise," both of which are indisputably law enforcement officers. Further reinforcing that § 2680(c)'s detention clause should not be read to preclude petitioner's claim is the fact that Congress knows how to define "law enforcement officer" broadly when it wants. Another FTCA exception, 28 U.S.C. 2680(h), defines "law enforcement officer" sufficiently broad to include federal prison officials, but Congress expressly prohibited § 2680(c) from being read *in pari materia* with it by making it applicable "for the purpose" of § 2680(h) only.

II. The legislative history of § 2680(c) confirms what the text shows. After years of failed tort claim bills, in 1931, the Department of Justice drafted a bill at Congress' request that, for the first time, contained § 2680(c)'s detention clause. The materials relied on by the Department in drafting the exception clearly establish that the Department did not intend to immunize detentions of property outside the customs or tax contexts. The Department used as its model a British bill that exempted claims for property torts "done by any officer of customs and excise acting as such." Although the FTCA was not enacted for another fifteen years, the Department's detention clause was reintroduced, debated repeatedly, and eventually enacted without change. No employee of the Department and, more importantly, no Member of Congress ever indicated that they understood § 2680(c) to be any broader than the British bill on which it was based.

III. The purpose for Congress' enactment of § 2680(c) likewise confirms that Congress intended the exception to exclude claims arising from detentions of property by only officers engaged in customs and tax activities. Congress enacted the FTCA to relieve itself of the burden of settling through private legislation hundreds of requests for compensation for the torts of federal employees each year. Where adequate alternative remedies already existed, how-

ever, Congress faced no such burden. Since long before the FTCA's enactment, the common law recognized suits against individual customs and tax officers for the negligent performance of their duties. Congress was undoubtedly aware of that preexisting remedy when it enacted the FTCA because it had for decades provided indemnification for such suits. Accordingly, the Court has repeatedly suggested, and the legislative history of the FTCA confirms, that § 2680(c) was enacted to avoid the creation of a duplicative remedy. No similar common law remedy existed against (and no congressional indemnification was provided for) general law enforcement officers. Any construction of § 2680(c) that expands its reach beyond the customs and tax contexts would, therefore, be inconsistent with Congress' stated desire to avoid creation of a duplicative remedy because, with respect to property torts committed by general law enforcement officers, there would have been *no* remedy and no relief from the burden of requests for private legislation.

IV. Finally, although Congress amended § 2680(c) in 2000, those amendments are irrelevant to this case. The 2000 amendments added a new clause to § 2680(c) and created an "exception to the exception" by waiving the United States' sovereign immunity for a subset of previously barred property claims arising in connection with asset forfeitures. The language added to the statute through this amendment has no application to petitioner because the detention of his property had nothing to do with forfeiture proceedings. The viability of petitioner's claim instead turns on whether § 2680(c)'s detention of property clause, which is original to the FTCA's 1946 enactment, was intended to preclude government liability for the property torts of law enforcement officers acting outside the customs or tax capacities. The text, context, legislative history, and purpose behind § 2680(c) all establish that it was not so intended.

ARGUMENT

SECTION 2680(C) OF THE FEDERAL TORT CLAIMS ACT DOES NOT EXEMPT THE UNITED STATES FROM LIABILITY FOR THE LOSS OF OR DAMAGE TO PRISONER PROPERTY BY FEDERAL PRISON OFFICIALS

Section 2680(c) exempts from the Federal Tort Claims Act's waiver of the United States' sovereign immunity "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. 2680(c). There is no dispute that it precludes FTCA suits to recover money damages from the United States for the loss of or damage to property detained by customs officers, tax officers, or other federal law enforcement officers acting in a customs or tax capacity. This case turns on whether the exception's use of the phrase "any other law enforcement officer" bars claims for the loss of or damage to property by federal law enforcement officers acting outside the customs and tax contexts.[9] Although the Court expressly left that

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[9] Petitioner has not sought review in this Court of the court of appeals' determination (JA 59-60) that his claim involves the "detention" of property, within the meaning of § 2680(c) and as interpreted by this Court in *Kosak v. United States*, 465 U.S. 848, 852 n.6 (1984) (interpreting § 2680(c) to apply both to claims for damage to property caused by a detention itself and to claims for damage caused by the "negligent handling or storage" of property). Although the scope of the word "detention" has not received the same amount of attention as the meaning of the phrase "any other law enforcement officer," it remains open to debate. Indeed, it would appear that at least the Second and Sixth Circuits would find, under the facts of this case, that there was no "detention" within the meaning of § 2680(c). See *Formula One Motors, Ltd. v. United States*, 777 F.2d 822, 823 (CA2 1985) (observing that a "detention" within the meaning of Section 2680(c) is a "physical seizure preliminary to search"); *Kurinsky v. United States*, 33 F.3d 594, 597 (CA6 1994) (describing "detention" within the meaning of § 2680(c) as a "temporary custody * * * often associated with an

very question open in *Kosak*, 465 U.S. at 852 n.6, its framework for construing the § 2680 exceptions establishes that the question must be answered in the negative and that the court of appeals' contrary holding must be reversed.

"The starting point of [the Court's] analysis * * * must, of course, be the language of § 2680(c)." *Id.* at 853. "'[I]n expounding * * * statute[s],'" however, the Court will "not [be] guided by a single sentence or member of a sentence, but [will] look to the provisions of the whole law, and to its object and policy.'" *Dole v. United Steelworkers*, 494 U.S. 26, 35 (1990) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)). The FTCA is treated no differently, notwithstanding that it is a waiver of the United States' sovereign immunity.[10] Accordingly, the Court's construction of

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ongoing investigation"), cert. denied, 514 U.S. 1082 (1995). Because the proper construction of "detention" is not at issue in this case but remains otherwise subject to debate, the Court should expressly reserve opinion on that issue whatever the disposition of this case. See, *e.g.*, *McRary v. New York*, 461 U.S. 961, 962-63 (1983) (Stevens, J., respecting denial of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow" an issue to "receive[] further study" in other courts "before it is addressed by this Court.").

[10] That is because, as the Court reiterated just two Terms ago,

> the general rule that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign" * * * is unhelpful in the FTCA context, where "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute," which "waives the Government's immunity from suit in sweeping language."

Dolan v. Postal Serv., 126 S. Ct. 1252, 1260 (2006) (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996); *Kosak*, 465 U.S. at 853 n.9; *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951)); see also *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) ("We have on occasion narrowly construed *exceptions* to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the sweeping language of the FTCA." (emphasis added)); *Block v. Neal*, 460 U.S. 289, 298 (1983) ("The exemption of the sovereign

the § 2680 exceptions has depended not on consideration of the disputed language "in isolation," but instead on a "reading of the whole statutory text," consideration of "the purposes and context of the statute," *Dolan*, 126 S. Ct. at 1257 (construing § 2680(b)), and consultation of the statute's legislative history, see, *e.g.*, *Kosak*, 465 U.S. at 855-61 (construing § 2680(c)).

Application of that framework – that is, a close analysis of § 2680(c)'s text, context, legislative history, and underlying purpose – clearly establishes that Congress intended § 2680(c) to bar tort claims for the loss of or damage to property by customs and tax officers and "any other law enforcement officer" acting in a customs or tax capacity but not officers (such as federal prison officials) acting in a general law enforcement capacity.

I. THE TEXT OF § 2680(C) DOES NOT BAR CLAIMS ARISING FROM DETENTIONS OUTSIDE THE CUSTOMS AND TAX CONTEXTS

It is "fundamental * * * that the words of a statute must be read in their context." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Section 2680(c)'s "any other law enforcement officer" phrase does not stand alone. It is surrounded by language specific to the activities of customs and tax officers. A proper interpretation of the phrase must, therefore, take into consideration the provision's customs- and tax-focused surroundings. *United States v. Morton*, 467

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from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.").

As a result, the Court's "proper objective" in construing one of the § 2680 exceptions "is to identify those circumstances which are within the words and reason of the exception – no less" but, just as importantly, "no more." *Dolan*, 126 S. Ct. at 1260 (internal quotations omitted); see also *Kosak*, 465 U.S. at 853 n.9; *Dalehite v. United States*, 346 U.S. 15, 31 (1953).

U.S. 822, 828 & n.8 (1984) (explaining that the Court "do[es] not * * * construe statutory phrases in isolation" but instead "in light of" their surroundings).

Among the Court's tools for conducting such a holistic analysis are the *ejusdem generis* and *noscitur sociis* canons, which are "particularly applicable" here. *Andrews v. United States*, 441 F.3d 220, 223 (CA4 2006) (applying canons to § 2680(c)). Their application to § 2680(c)'s customs- and tax-focused language not only establishes that Congress intended § 2680(c) to apply to only customs officers, tax officers, and "other law enforcement officer[s]" carrying out customs- or tax-related functions, but also gives the statute its most coherent reading and renders none of the statute inoperative.

1. The *esjudem generis* canon, which means "of the same sort,"

> stands for the proposition that when a text lists a series of items, a general term included in the list should be understood to be limited to items of the same sort. For instance, if someone speaks of using "tacks, staples, screws, nails, rivets, and other things," the general term "other things" surely refers to other fasteners.

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 26 (1997); see also *Bazuaye v. United States*, 83 F.3d 482, 484 (CADC 1996) ("[I]f a statute lists 'fishing rods, nets, hooks, bobbers, sinkers and other fishing equipment,' 'other equipment' might mean plastic worms and fishing line, but not snow shovels or baseball bats." (quoting *United States v. Aguilar*, 515 U.S. 593, 615 (1995) (Scalia, J., dissenting)); *Black's Law Dictionary* 556 (8th ed. 2004).

The Court's recent decision in *Washington State Department of Social & Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003), is instructive. The statute at issue in that case precluded certain Social Security benefits from being recovered through "execution, levy, at

tachment, garnishment, *or other legal process*." 42 U.S.C. 407(a) (emphasis added). The question before the Court was whether "other legal process" covered the State of Washington's method of recovery – namely, reimbursing itself with funds already in its possession but held in trust for the beneficiaries – that was not similar to execution, levy, attachment, or garnishment, but nevertheless fit superficially into the broad category of "other legal process[es]." *Keffeler*, 537 U.S. at 382.

The Court acknowledged that the phrase "other legal process" is sufficiently broad "in the abstract" so as to render the State's method of recovery a "legal process." *Id.* at 384. But relying on *ejusdem generis*, the Court held that § 407(a) "uses the term 'other legal process' far more restrictively." *Ibid.* According to the Court, the statute encompassed only "other legal process[es]" that were "similar in nature to" or "much like the processes of execution, levy, attachment, and garnishment." *Id.* at 384-85. Those specifically enumerated methods of recovery all "require[d] utilization of some judicial or quasi-judicial mechanism * * * by which control over property passes from one person to another." *Id.* at 385. Because the State's method of reimbursing itself with funds already in its possession did not, the Court held that the "legal process" employed by the State did not fall within § 407(a)'s "other legal process" phrase. *Ibid.*

The Court reaffirmed the continuing applicability of *ejusdem generis* (though not referring to it by name) to a disjunctive list of similarly narrow terms followed by a general term just two Terms ago, when it construed another FTCA exception in *Dolan*, *supra*. The exception at issue in that case preserved the United States' sovereign immunity for "[a]ny claim arising out of the loss, miscarriage, *or negligent transmission* of letters or postal matter." 28 U.S.C. 2680(b) (emphasis added). The question before the Court was whether slip-and-fall injuries resulting from a negligently placed parcel arose out of the "negligent transmis-

sion" of the parcel. *Dolan*, 126 S. Ct. at 1256-57. Despite the broad sweep of "negligent transmission" when considered "in isolation," the Court looked to the phrase's two preceding terms: "loss" and "miscarriage." *Id.* at 1257. "Those terms," the Court held, "limit[ed] the reach of 'transmission'" to failures "to deliver mail in a timely manner to the right address" and, therefore, required that the exception not bar the plaintiff's claim. *Ibid.*

Section 2680(c), like the statute at issue in *Keffeler* and § 2680(b) in *Dolan*, "presents a textbook *ejusdem generis* scenario." *Andrews*, 441 F.3d at 224; see also *Ortloff v. United States*, 335 F.3d 652, 658-59 (CA7 2003) (applying canon to § 2680(c)), cert. denied, 540 U.S. 1225 (2004); *Bazuaye*, 83 F.3d at 484 (same); *Kurinsky*, 33 F.3d at 596-97 (same). Despite the broad sweep of "any other law enforcement officer" in the abstract, § 2680(c) "uses the term * * * far more restrictively." *Keffeler*, 537 U.S. at 384. "It contains a general phrase – 'any other law enforcement officer' – that follows a recitation of specific things – 'any officer of customs or excise' – whose similar characteristic is that they are charged with the function of enforcing the revenue laws (customs and tax, respectively) of the United States." *Andrews*, 441 F.3d at 224. A faithful application of the *ejusdem generis* canon, therefore, dictates that an agent of the Drug Enforcement Agency (DEA) who "seized and searched an automobile that had been shipped from abroad and was still in its shipping container" would fall within the scope of the phrase "any other law enforcement officer" as used in § 2680(c) because he is performing a function similar to an "officer of customs or excise." *E.g.*, *Formula One*, 777 F.2d at 824. But a Bureau of Prisons (BOP) officer handling petitioner's property would not fall within the scope of the phrase "any other law enforcement officer" because he is not performing such a function.

2. The related canon, *noscitur a sociis*, literally means "it is known by its companions." Scalia, *supra*, at 26. It

> stands for the principle that a word is given meaning by those around it. If you tell me, "I took the boat out on the bay," I understand "bay" to mean one thing; if you tell me "I put the saddle on the bay," I understand it to mean something else.

Ibid.; see also *Black's Law Dictionary, supra*, at 1087. Its primary function, as the Court has explained, is "to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

Jarecki is illustrative. In that case, the Court was asked to decide whether income from the sales of certain new products was income resulting from "discovery" under a tax deferral provision applicable to "income resulting from exploration, discovery, or prospecting." 26 U.S.C. 456(a)(2)(B) (1952). Applying *noscitur a sociis*, the Court concluded that the statute did not apply to the "discovery" of a new product. *Jarecki*, 367 U.S. at 307. According to the Court, the statute's use of the word "discovery" "gather[ed] meaning from the words around it." *Ibid.* The fact that the rest of the statute's words "all describe income-producing activity in the oil and gas and mining industries," the Court reasoned, "strongly suggest[s] that a precise and narrow application was intended." *Ibid.*

The Court similarly applied *noscitur a sociis* in *Gutierrez v. Ada*, 528 U.S. 250 (2000), to a provision in the Guam Organic Act that mandated a runoff election for Governor and Lieutenant Governor "[i]f no candidates receive a majority of the votes cast in any election," 48 U.S.C. 1422. The Court found that the context surrounding the phrase "in any election," though superficially appearing to apply to all elections, was actually intended to refer to only gubernatorial elections. *Gutierrez*, 528 U.S. at 254-58. "[T]he key to understanding the phrase," the Court explained, is that "the reference to 'any election' is preceded by two references to gubernatorial election and followed by four." *Id.* at 254-55. Thus, continued the Court, "with 'any election' so surrounded, what could it refer to except an election for Gover-

nor and Lieutenant Governor, the subject of such relentless repetition?" *Ibid.*

Section 2680(c) is replete with evidence that Congress intended the phrase "any other law enforcement officer" to apply more narrowly than might appear from reading the phrase in isolation. Its first two clauses "dwell exclusively on customs and taxes." *A-Mark, Inc. v. Secret Service*, 593 F.2d 849, 851 (CA9 1978) (Tang, J., concurring). The first "refers solely to claims arising from the specific actions of assessing or collecting a tax or customs duty," while the second refers to the detention of property by officials "whose job is to enforce the tax and customs laws." *Andrews*, 441 F.3d at 224-25. The fact that both of these clauses "have a clear and defined meaning limited to the enforcement of the tax and customs laws confirms that Congress did not 'shift its attention' outside of the tax and customs context when it added the unqualified 'any other law enforcement officer.'" *Id.* at 225. To read that phrase otherwise would be illogical and give it the very unintended breadth that the *ejusdem generis* and *noscitur a sociis* canons seek to avoid.

3. Another compelling reason to find § 2680(c) inapplicable to this case is the rule against superfluities, which "complements the principle that courts are to interpret the words of a statute in context" and requires courts to construe statutes "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citing 2A Norman J. Singer, *Statutes and Statutory Construction*, § 46.06, at 194 (6th ed. 2000)).

Section 2680(c) precludes damage suits "arising in respect of * * * the detention of any goods, merchandise, or other property *by any officer of customs or excise or any other law enforcement officer*." (Emphasis added.) A broad interpretation of "any other law enforcement officer" to include all officers regardless of capacity would render the preceding phrases "any officer of customs or excise" superfluous. Customs and tax officers, who are indisputably law

enforcement officers,[11] would be subsumed by the broader category of "other law enforcement officer[s]." See *Ortloff*, 335 F.3d at 659; *Bazuaye*, 83 F.3d at 484. If Congress had actually intended that phrase to include any law enforcement officer regardless of capacity, the provision could have simply read "detention * * * by any law enforcement officer" and meant precisely the same thing.

Congress should not be presumed to have included language that has no operative effect. The phrase "any officer of customs or excise or any other law enforcement officer" should be read to give effect to all of its terms. This can be done only by recognizing Congress' awareness that officers other than customs or tax officers are at times in situations in which they are executing customs or tax laws, or otherwise acting in a customs or tax capacity. See, *e.g.*, *Formula One*, 777 F.2d at 823 (holding that the conduct of DEA agents who "seized and searched an automobile that had been shipped from abroad and was still in its shipping container" fell within the scope of § 2680(c)). This reading gives an entirely sensible meaning to all of the terms used in § 2680(c) and does not render superfluous any of the language selected by Congress.[12]

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[11] See 19 U.S.C. 1589a (authorizing customs officers to carry a firearm, execute any warrant, subpoena or summons, make an arrest without a warrant upon reasonable grounds, and perform "any other law enforcement duty" authorized by the Secretary of the Treasury); 26 U.S.C. 7608 (establishing substantially same duties for internal revenue officers "charged with enforcing the criminal, seizure, or forfeiture provisions" of the tax code).

[12] In *Ysasi v. Rivkind*, the Federal Circuit asserted that the interpretation advanced by petitioner here "would render the phrase 'or any other law enforcement officer' surplusage." 856 F.2d 1520, 1524 (CAFC 1988). How this is so is unclear. Petitioner concedes that § 2680(c) preserves sovereign immunity for the property torts of federal law enforcement officers who are neither customs not tax officers but are nonetheless involved in functions "sufficiently akin to the functions carried out by Customs [or tax] officials." *Formula One*, 777

4. None of the courts of appeals adopting a broad reading of § 2680(c)'s "any other law enforcement officer" phrase has attempted to apply interpretive canons – much less, considered the phrase's context. Indeed, most have "merely conclusorily stated * * * without any analysis," *Ortloff*, 335 F.3d at 659,[13] that the "plain language" of the phrase "any other law enforcement officer" in § 2680(c) requires a broad reading. See *Halverson v. United States*, 972 F.2d 654, 656 (CA5 1992) (*per curiam*) ("We find persuasive * * * the plain language of § 2680(c) that exempts '[a]ny claim arising in respect of * * * the detention of any goods or merchandise by * * * any other law enforcement officer.'"); *Ysasi*, 856 F.2d at 1524 ("[T]he government's broad reading of [§ 2680(c)] comports with * * * the plain language of the statute."); see also, *e.g.*, *Schlaebitz*, 924 F.2d at 194-95

F.2d at 824. To this end, petitioner does not quibble with *Formula One*, in which the Second Circuit found that the conduct of DEA agents who "seized and searched an automobile that had been shipped from abroad and was still in its shipping container" fell within the scope of § 2680(c). *Ibid.*; see also *Mid-South Holding Co. v. United States*, 225 F.3d 1201, 1205-06 & n.6 (CA11 2000) (describing how the Coast Guard's law enforcement authority is analogous to that of the Customs Service). Instead, petitioner's issue is with the refusal of the court of appeals below to "construe the phrase 'or any other law enforcement officer' as supplementing the tax and customs context of the exception," such that the exception would be limited to "other officials assisting the customs or tax collection." *Schlaebitz v. Department of Justice*, 924 F.2d 193, 194 (CA11 1991) (*per curiam*).

[13] See also *Andrews*, 441 F.3d at 228 (criticizing courts of appeals adopting broad reading of § 2680(c) for lack of meaningful analysis); *Kurinsky*, 33 F.3d at 598 ("[O]ther appellate courts that have addressed this issue have found that the phrase 'other law enforcement officer' includes all types of officers, whatever their duties, [but] those cases have not articulated a clear reason for this holding, and have often stated their conclusions with little or no analysis."); *Formula One*, 777 F.2d at 823 ("[S]everal circuits have ruled, with scant discussion, that section 2680(c) applies to detentions beyond the context of customs duties and taxes.").

(summarily following *Ysasi* to hold that § 2680(c) "specifically exempts any claim based on the detention of goods by law enforcement officers in the performance of their lawful duties"). By failing to consider the context surrounding § 2680(c)'s "any other law enforcement officer" phrase, those courts have critically misapplied (what they described as) "plain language" analysis.

The search for "plainness" requires not only "reference to the language itself," but also consideration of "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (describing how courts determine "[t]he plainness or ambiguity of statutory language"). In other words, a court's search for plainness requires the very context-based reading advanced by petitioner (pages 12-18, *supra*) and that has led all four courts of appeals that have performed it to construe § 2680(c)'s "any other law enforcement officer" phrase narrowly. See *Andrews*, 441 F.3d at 223-25; *Ortloff*, 335 F.3d at 658-60; *Bazuaye*, 83 F.3d at 484; *Kurinsky*, 33 F.3d at 596-97.

The few courts of appeals that have attempted to justify their holdings that § 2680(c) includes officers acting in general law enforcement capacities with more than just conclusory assertions have done so by reading § 2680(c) in light of 28 U.S.C. 2680(h). See *Bramwell v. Bureau of Prisons*, 348 F.3d 804, 807 (CA9 2003), cert. denied, 543 U.S. 811 (2004); *Chapa v. Department of Justice*, 339 F.3d 388, 390 (CA5 2003) (*per curiam*).[14] That provision defines an "investiga-

[14] These courts were also "persuaded by the fact that BOP officers are considered 'law enforcement officers' under several other statutes." *Bramwell*, 348 F.3d at 807 (citing *Chapa*, 339 F.3d at 390, and collecting examples). Petitioner does not dispute that, as a general matter, BOP officers are "law enforcement officers." Nor does petitioner dispute that BOP officers are "law enforcement officers" under § 2680(h). Indeed, the Court in *Carlson v. Green*, 446 U.S. 14, 17, 20 (1980), held as much when it found that a victim of unlawful

tive or law enforcement officer" broadly to include "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."[15] Under the *in pari materia* canon, "a term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994); see also *Black's Law Dictionary*, *supra*, at 807 (noting that, under the *in pari materia* or "in the same matter" canon, statutes "may be construed together, so that inconsistencies in one statute may

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conduct by BOP officials would have a cause of action against the government under § 2680(h). The question before the Court in this case, however, is not whether BOP officers are "law enforcement officers" in a general sense or under § 2680(h) but instead whether they are the type of "other law enforcement officer" whose conduct Congress sought to immunize through § 2680(c).

The Fifth Circuit in *Chapa* additionally relied on the principle that a waiver of the Government's sovereign immunity should be strictly construed in favor of the sovereign. See 339 F.3d at 390. As already explained, the Court has repeatedly rejected the applicability of that irterpretive principle to the § 2680 exceptions. See note 10, *supra*.

[15] Section 2680(h) exempts from the FTCA's waiver of sovereign immunity:

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

be resolved by looking at another statute on the same subject"). Those courts' reliance on the *in pari materia* canon, however, was misplaced.

The canon "readily yields" when there is evidence that the words at issue "were employed in different parts of the act with different intent." *General Dynamics Land Sys. v. Cline*, 540 U.S. 581, 595 (2004) (quoting *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433-34 (1932)). In other words, "[w]here the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different * * * the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed." *Atlantic Cleaners*, 286 U.S. at 433-34 (noting that "[i]t is not unusual for the same word to be used with different meanings in the same act" and according different interpretations to the same phrase in different sections of the same act) (citations omitted); accord, *Helvering v. Stockholm Enskilda Bank*, 293 U.S. 84, 87-88 (1932). Here, an examination of the context and history of § 2680(c) and § 2680(h) reveals that the conditions under which their respective "law enforcement officer" provisions were enacted and their intended subject matters differ substantially.

Congress' intent that § 2680(h)'s definition of "law enforcement officer" not apply outside that subsection is explicit in the provision's text. By its own terms, § 2680(h)'s definition of "law enforcement officer" is limited "for the purpose of this subsection." See also *Andrews*, 441 F.3d at 226 ("Congress expressly limited [§ 2680(h)'s] definition of 'investigative or law enforcement officer'" to that subsection alone).[16] Moreover, Congress knows how to override

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[16] The courts of appeals repeatedly refuse to apply the *in pari materia* canon to define a term in one provision when Congress expressly limited the definition to another. See, *e.g.*, *In re Princo Corp.*,

§ 2680(h)'s limitation when it wants to do so.[17] See 19 U.S.C. 1630(a) (expressly incorporating by cross-reference § 2680(h)'s definition); 31 U.S.C. 3724(a) (same). Under such circumstances, the rule against superfluities requires that § 2680(h)'s limitation be enforced and that its definition of "law enforcement officer" not be ascribed to § 2680(c). "To apply the § 2680(h) definition beyond that subsection," as the Fourth Circuit observed, "would make meaningless the limitation that Congress placed on the definition." *Andrews*, 441 F.3d at 226.[18] Indeed, it is likely for this reason that the

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486 F.3d 1365, 1368 (CAFC 2007) (holding that where the definitional provision of 19 U.S.C. 1337 "limits the definition of 'becomes final' to subsections (j)(3) and (c)," the definition cannot be applied to a related civil statute); *United States v. Nason*, 269 F.3d 10, 17 (CA1 2001) ("[W]hen Congress inserts limiting language [or, in this case expansive language] in one section of a statute but adjures that language in another, closely related section, the usual presumption is that Congress acted deliberately and purposefully in the disparate omission."); *United States v. Amada*, 200 F.3d 647, 650-51 (CA9 2000) (holding that where the definition of "lottery" is "expressly limited to [18 U.S.C.] § 1307(b)," the definition cannot be applied to a related civil statute).

[17] As will be explained in greater detail (note 42, *infra*), Congress affirmatively declined to incorporate § 2680(h)'s definition into § 2680(c) when it rejected H.R. 1745, 105th Cong., 1st Sess. § 106 (1997), which contained language doing so.

[18] The fact that § 2680(h) defines "law enforcement officer" broadly and goes so far as to state expressly that the broad definition applies to only § 2680(h) not only eliminates any suggestion that subsections (c) and (h) should be read as parallel but strongly suggests the opposite. "'[W]hen the legislature uses certain language in one part of the statute and different language in another, the Court assumes different meanings were intended.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (quoting 2A Singer, *supra*, § 46:06, at 194); see also *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." (quoting *City of Chicago v. Environmental Def. Fund*, 511 U.S. 328, 338 (1994))). Because the class of law enforcement officers defined in § 2680(h) is all-encompassing, Congress' express

leading treatise on statutory construction warns that "a definition which relates specifically to a term as used in a single article of a code cannot be used *in pari materia* with other articles." 2B Singer, *supra*, § 51:3.

Additionally, the "law enforcement officer" provisions of subsections (c) and (h) were enacted at different times and for different purposes.[19] The phrase "any other law enforcement officer" in § 2680(c) is original to the FTCA's 1946 enactment and relates to property loss. The second clause of § 2680(h), including the definition of "law enforcement officer," was added to the FTCA nearly thirty years later in 1974 for reasons that have nothing to with property loss but instead relate to physical harms to individuals.[20] In light of

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limitation on that definition's application must mean that Congress intended the class of law enforcement officers referenced in § 2680(c) to be narrower – *viz.*, law enforcement officers acting in a customs or tax capacity.

[19] Had the two subsections been enacted at the same time, the *in pari materia* canon might have greater force. See *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (observing that application of the *in pari materia* canon "makes the most sense when the statutes were enacted by the same legislative body at the same time").

[20] The legislative history of the 1974 amendment to § 2680(h) demonstrates that it was designed to address physical harm resulting from abuses by federal law enforcement officers of the federal "no-knock" statute and to provide a remedy against the government for the same type of conduct that serves as the basis for claims under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). See S. Rep. No. 588, 93d Cong., 1st Sess. 2-3 (1973). Indeed, as the Ninth Circuit observed, "[t]he substance of the amendment was portrayed as concerned primarily with the search and seizure issue with no discussion of the effect of the amendment on the whole of the FTCA." *Wright v. United States*, 719 F.2d 1032, 1036 n.2 (CA9 1983); see also *Sutton v. United States*, 819 F.2d 1289, 1295-97 (CA5 1982) (discussing the legislative history of the 1974 amendment to § 2680(h)); Jack Boger *et al.*, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C.L. Rev. 497, 500-16 (1976) (same).

this strong evidence that the phrase "law enforcement officer" was "employed in different parts of the act with different intent," the *in pari materia* presumption must "yield," *General Dynamics*, 540 U.S. at 595, to the meaning of § 2680(c) that the provision's textual context, legislative history, and underlying purpose dictate.

II. THE LEGISLATIVE HISTORY OF § 2680(C) CONFIRMS THAT CONGRESS DID NOT INTEND TO BAR CLAIMS ARISING FROM DETENTIONS OF PROPERTY OUTSIDE THE CUSTOMS AND TAX CONTEXTS

The legislative history of § 2680(c) confirms that Congress intended the exception to exclude claims arising from detentions of property by only officers engaged in customs and tax activities. Section 2680(c)'s detention clause was drafted by the Department of Justice at Congress' request and enacted without change. Nothing in the legislative record or in the Department's underlying materials indicates that Congress intended to preclude government liability for property torts committed by law enforcement officers acting outside the customs and tax contexts.

1. The FTCA was enacted as title IV of the Legislative Reorganization Act of 1946 (LRA), Pub. L. No. 79-601, 60 Stat. 812, 842-47. The legislative history of that bill, S. 2177, 79th Cong., 2d Sess. (1946) (enacted), focuses on the internal reorganization of congressional operations, not the FTCA provisions. Consequently, the Court's review of the FTCA's legislative history repeatedly has extended back to prior stand-alone tort claim bills considered by Congress over the two decades preceding the FTCA's enactment. See, *e.g.*, *Sosa*, 542 U.S. at 707; *United States v. Shearer*, 473 U.S. 52, 55 (1985); *United States v. S.A. Empresa De Viacao Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808-10 (1984); *Kosak*, 465 U.S. at 855-61; *Dalehite*, 346 U.S. at 26-30. Such a review is particularly appropriate here because the text of § 2680(c)'s detention of property clause was first considered by Congress fifteen years before the FTCA's passage and

carried forward without change through numerous subsequent tort claim bills until it was finally enacted.

2. From 1926 to 1931, eleven federal tort claim bills were proposed in, considered by, and ultimately rejected by Congress. At least eight of those eleven bills contained an exception for "any claim arising in respect of the assessment or collection of any tax or customs duty."[21] In 1931, Representative Collins introduced a bill, which for the first time in the FTCA's drafting history, expanded on earlier bills' customs and tax exception by also exempting claims "arising in respect of * * * the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer." H.R. 5065, 72d Cong., 1st Sess. § 206(2) (1931). This bill was drafted at Representative Collins' request by the Department of Justice and the General Accounting Office of the Comptroller General. See *A General Tort Bill: Hearing on H.R. 5065 Before A Subcomm. of the H. Claims Comm.*, 72d Cong., 1st Sess. 7, 22 (1932) [hereinafter "1932 Hearing"] (statements of Rep. Collins and Col. O.R. McGuire, Counsel to the Comptroller General); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 7 (1945) (letter dated Feb. 14, 1940 from Robert H. Jackson, Att'y Gen.); Brief for

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[21] Compare H.R. 6716, 69th Cong., 1st Sess. § 8(a)(2) (1926); H.R. 8651, 69th Cong., 1st Sess. § 8(a)(2) (1926); S. 1912, 69th Cong., 1st Sess. § 8(a)(2) (as reported by H. Claims Comm., Mar. 26, 1926); H.R. 9285, 70th Cong., 1st Sess. § 8(a)(2) (1928); S. 4377, 71st Cong., 2d Sess. § 4(a)(2) (1930); H.R. 15428, 71st Cong., 3d Sess. § 4(a)(2) (1930); H.R. 16429, 71st Cong., 2d Sess. § 3(2) (1931); and H.R. 17168, 71st Cong., 3d Sess. § 3(a)(2) (1931), with H.R. 12178, 68th Cong., 2d Sess. (1925); H.R. 12179, 68th Cong., 2d Sess. (1925); H.R. 8914, 69th Cong., 1st Sess. (1926).

For explanations of the varying reasons why these bills were never enacted, see, *e.g.*, 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 2.09, at 2-51 to 2-63 (2007) (detailing the nature of tort claim proposals considered by Congress between 1925 and 1946); Note, *The Federal Tort Claims Act*, 56 Yale L. J. 534, 535-36 n.10 (1947) [hereinafter "Yale L.J. Note"] (same).

the United States in *Kosak v. United States*, O.T. 1983, No. 82-618, at 19 [hereinafter "U.S. *Kosak* Br."].

Because of "the absence of any direct evidence regarding how members of Congress understood the provision that became § 2680(c)," the Court has instead looked to and considered "significant" "the views of [the exception's] draftsman" and whether he believed that what is now § 2680(c) "would bar" a particular suit. *Kosak*, 465 U.S. at 856-57 n.13.[22] That individual was "almost certainly" Alexander Holtzoff, then a Special Assistant to the Attorney General (and later a District Judge), and "one of the major figures in the development of the Tort Claims Act."[23] *Id.* at 856. The

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[22] *Kosak* is, of course, not the only case in which the Court has relied on a pre-enactment statement of purpose from the Department of Justice. See, *e.g.*, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 351-52 (1977) (relying on "[a] Justice Department statement concerning Title VII * * * made before § 703(h) was added to Title VII" because it is an "authoritative indicator[] of that section's purpose").

[23] Following Representative Collins' request that the Department of Justice and General Accounting Office draft a tort claim bill, Attorney General William DeWitt Mitchell assigned Judge Holtzoff "'to the special task of co-ordinating [sic] the views of the Government departments' regarding the proper scope of a tort claims statute." *Kosak*, 465 U.S. at 857 n.13 (quoting Edwin M. Borchard, *The Federal Tort Claims Bill*, 1 U. Chi. L. Rev. 1, 1 n.2 (1933)). "[A]fter a conference with every department and independent establishment in Washington," 1932 Hearing, *supra*, at 17 (testimony of Asst. Atty. Gen. Charles B. Rugg), and after requesting "pertinent data [and] suggest[ions as to] what tort claims should or should not be enforcible, [sic] against the United States," Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 16 (1931) [hereinafter "Holtzoff Report"], Judge Holtzoff drafted a tort claim bill and accompanying explanatory report and submitted them to Assistant Attorney General Charles B. Rugg, see *Kosak*, 465 U.S. at 857 n.13. Assistant Attorney General Rugg in turn "transmitted [them] to the General Accounting Office." *Ibid.* Although there is no notation that Judge Holtzoff's bill and report were "introduced into the public record," "it is likely" that

"detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer" language that Representative Collins first introduced (and that Congress eventually enacted fifteen years) later mirrors *precisely* what Judge Holtzoff proposed in his draft tort claim bill. Compare H.R. 5065, *supra*, § 206(2), and LRA § 421(c), 60 Stat. at 845, with Alexander Holtzoff, *Proposed Federal Tort Claims Bill* § 4(2) (1931) [hereinafter "Holtzoff Bill"].

3. Judge Holtzoff's materials, like the text of § 2680(c) itself, demonstrate that the provision was developed to provide a limited exception to the FTCA that would address the business of assessing customs duties and taxes while accounting for other acts and other actors necessary to carry out such business. In apparent recognition that the detention of property was often necessarily incidental to the assessment of duties and taxes, see, *e.g.*, *Boyd v. United States*, 116 U.S. 616, 623 (1886) ("[T]he seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them * * * ha[s] been authorized by our own revenue acts from the commencement of the government."); see also *A-Mark*, 593 F.2d at 850-51 (Tang, J., concurring) (noting that "[t]he governmental function of assessing and collecting customs duties necessarily requires some period of detention when the imported item is inspected for purposes of evaluation" and that "[a] similar situation often arises when property must be levied against for tax purposes"), Judge Holtzoff explained in the report accompanying his draft bill that he "expanded the exception so as to include immunity from liability in respect of loss in

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they were "brought to the attention of the Congressmen considering the bill." *Kosak*, 465 U.S. at 857 n.13. Congress never considered a bill with the detention of property clause until it took up H.R. 5065, which was drafted by the Department of Justice and General Accounting Office and introduced just a few months after Judge Holtzoff drafted his bill and accompanying report.

connection with the detention of goods or merchandise by an officer of customs or excise." Holtzoff Report, *supra*, at 16 (discussing Holtzoff Bill, *supra*, § 4(2)).

Although he immediately thereafter elaborated that this "additional proviso has special reference to the detention of imported goods in appraisers' warehouses or customs houses, as well as seizures by law enforcement officials, internal revenue officers, and the like," nowhere did he indicate that he designed the additional proviso to "include immunity" from property torts by law enforcement officers acting outside the customs or tax contexts. *Ibid.* Had he so intended, one would expect that he would have said so explicitly. His reference to "other law enforcement officers, internal revenue officers, and the like" immediately following his reference to "appraisers' warehouses or customs houses" is best understood as his way of explaining that the exception turned on the acts in which "other law enforcement officers, internal revenue officers, and the like" might be engaged – specifically, the detention of property while enforcing customs and tax laws. *Ibid.*; see also *A-Mark*, 593 F.2d at 851 (Tang, J., concurring) (arguing that the "any other law-enforcement officer" phrase included by Congress in what is now § 2680(c) "should be viewed as Congress's recognition of the fact that federal officers, other than customs and excise officers, sometimes become involved in the activity of detaining goods for tax or customs purposes"); contrast *Ysasi*, 856 F.2d at 1524 (stating, without explanation, that "a broad reading of the section comports with [Judge Holtzoff's] report").

Lest there be any doubt, Judge Holtzoff's confessed inspiration for the proviso is "even more explicit" that immunity should be preserved for only the activities of law enforcement officers acting in a customs or tax capacity. *Kosak*, 465 U.S. at 856 n.12. As Judge Holtzoff explained in his report, he gleaned the additional proviso from a proposed draft tort claim bill submitted by the Crown Proceedings Commission in England in 1927. See Holtzoff Report, *supra*,

at 16. The relevant section in the Report of the Crown Proceedings Committee reads as follows:

> No proceedings shall lie under this section * * * for or in respect of the loss of or any deterioration or damage occasioned to, or any delay in the release of, any goods or merchandise by reason of anything done or omitted to be done by *any officer of customs and excise acting as such.*

Report of Crown Proceedings Comm., Cmd. 2842, § 11(5)(c), at 17-18 (Apr. 1927) (Eng.) (emphasis added).[24] Nothing in it suggests that the activities of law enforcement officers acting outside the customs or tax contexts would be immunized.

4. After Congress failed to enact H.R. 5065, it considered various other tort claim bills over the next fifteen years. Judge Holtzoff's proposed exception containing the phrase "detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer" was reintroduced repeatedly and without change[25] until it was finally enacted in 1946. See LRA § 421(c), 60 Stat. at 845.

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[24] For some reason, the detention of goods proposal in the British bill was never enacted into law in Great Britain. See *Kosak*, 465 U.S. at 856 n.12; Crown Proceedings Act, 1947, 10 & 11 Geo. 6, ch. 44 (Eng.).

[25] See S. 211, 72d Cong., 1st Sess. § 206(2) (1931); S. 4567, 72d Cong., 1st Sess. § 206(2) (1932); H.R. 129, 73d Cong., 1st Sess. § 6(2) (1933); S. 1833, 73d Cong., 1st Sess. § 206(2) (1933); H.R. 2028, 74th Cong., 1st Sess. § 6(2) (1935); S. 1043, 74th Cong., 1st Sess. §206(2) (1935); S. 2690, 76th Cong., 1st Sess. § 303(2) (1939); H.R. 7236, 76th Cong., 3d Sess. § 303(2) (1940); H.R. 5299, 77th Cong., 1st Sess. § 303(2) (1941); H.R. 5373, 77th Cong., 1st Sess. § 303(2) (1941); S. 2207, 77th Cong., 2d Sess. § 402(3) (1942); S. 2221, 77th Cong., 2d Sess. § 402(3) (1942); H.R. 6463, 77th Cong., 2d Sess. § 402(3) (1942); H.R. 817, 78th Cong., 1st Sess. § 303(2) (1942); H.R. 1356, 78th Cong., 1st Sess. § 402(3) (1943); S. 1114, 78th Cong., 1st Sess. § 402(3) (1943); H.R. 181, 79th Cong., 1st Sess. § 402(3) (1945); S. 2177, *supra*, § 421(c).

Over this period, Congress discussed what is now § 2680(c) on numerous occasions. It never mentioned that this language could – let alone should – be construed broadly to apply to all law enforcement officers in all contexts. Instead, Congress continuously referred to the exception as one dealing solely with customs and tax enforcement functions.[26] "If Congress had intended the exception to extend to detentions by 'any law-enforcement officer' outside the area of tax or customs, one would expect a more encompassing explanation," *A-Mark*, 593 F.2d at 851 (Tang, J., concurring) (observing that Senate Report 1400 "speaks of the detention of goods only by customs officers"); see also *Kurinsky*, 33 F.3d at 598 (observing that Senate Report 1400 "makes no mention whatsoever of an exemption for any and all seizures by law enforcement officers"); *Formula One*, 777 F.2d at 825 (Oakes, J., concurring) (noting the failure of the House Judiciary Committee in House Report 1287 to mention an exemption for detentions of property by law enforcement officers acting outside the areas of customs or tax), or at minimum, some debate about whether it would reach such activities. There was neither.

Even the Department of Justice, which was invited by Congress to analyze subsequent tort claim bills, characterized what is now § 2680(c) as applying to only "claims arising out of * * * the assessment or collection of taxes or duties

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[26] See H.R. Rep. No. 2428, 76th Cong., 3d Sess. 5 (1940) (providing that the statute would "except from the operation of the act * * * claims arising in connection with * * * the collection of taxes"); S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942) ("These exceptions cover claims arising out of * * * the assessment or collection of taxes or assessments [and] the detention of goods by customs officers."); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942) (same); H.R. Rep. No. 1287, *supra*, at 6 (same); S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946) (same); Joint Comm. on the Organization of Cong., *Explanation of the Legislative Reorganization Act of 1946*, 79th Cong., 2d Sess. 38 (Comm. Print 1946) [hereinafter "LRA Explanation"] (same).

* * * [and] the detention of goods by customs officers." *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the H. Judiciary Comm.*, 77th Cong., 2d Sess. 28, 33 (1942) [hereinafter "1942 Hearing"] (statement of Francis M. Shea, Asst. Att'y Gen.). Noticeably absent from the Department's explanation is any statement that the exception was intended to extend – or that its text extends – to detentions by "any law-enforcement officer" outside the area of customs or tax.[27] Had the Department, as the agency that drafted the exception, see U.S. *Kosak* Br. at 20 ("[The Department of Justice added the detention of property clause."), believed that what is now § 2680(c) was intended to reach so broadly, it surely would have characterized the exception's language as such or proposed new language. It did neither.

What is now § 2680(c) was first crafted to address claims arising out of customs and tax assessments. Judge Holtzoff then expanded the exception to include claims arising out of property detentions ancillary to those assessments by any law enforcement officers who might be involved, and Congress enacted his language without change. Nothing in Judge Holtzoff's materials or anything else in the legislative history of the FTCA even suggests that Judge Holtzoff, the Department of Justice, or Congress intended what is now § 2680(c) to sweep so broadly as to cover property claims arising out of all detentions or that Congress contemplated the exclusion of claims like petitioner's under the exception.

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[27] Likewise, bar associations consulted by Congress on draft tort claim bills never interpreted this language to apply to all law enforcement officers regardless of context. See, *e.g.*, *Tort Claims Against the United States: Hearing on H.R. 7236 Before Subcomm. No. 1 of the H. Judiciary Comm.*, 76th Cong., 3d Sess. 9 (1940) (report of the Chicago Bar Assn. Comm. on Fed. Legislation) ("The provisions of the act are not to apply * * * to claims arising out of the * * * assessment or collection of taxes or customs duties.").

III. THE CONGRESSIONAL PURPOSE BEHIND § 2680(C) CONFIRMS THAT CONGRESS DID NOT INTEND TO BAR CLAIMS ARISING FROM DETENTIONS OF PROPERTY OUTSIDE THE CUSTOMS AND TAX CONTEXTS

The purpose behind Congress' enactment of § 2680(c) – like the exception's text and legislative history – confirms that Congress intended the exception to exclude claims arising from detentions of property by only officers engaged in customs and tax activities. The "rationale underlying § 2680(c)'s exception in the context of customs and excise functions does not justify a reading which would extend the coverage of the exception to all other law enforcement officers." *Ortloff*, 335 F.3d at 659. Rather, the limited nature of the exception as originally conceived stems from Congress' recognition of the availability of other means by which the government would compensate plaintiffs for customs and tax officers' negligent handling of their property and Congress' concomitant desire to avoid creating a redundant remedy.

1. Prior to the FTCA's enactment, the United States' sovereign immunity barred suits against it for the negligent acts or omissions of its employees. As a result, those seeking compensation directly from the United States for such negligent acts had to bring their claims to Congress, which would investigate, adjudicate, and settle the claims through private legislation. See *United States v. Muniz*, 374 U.S. 150, 154 (1963). The "mass of claims," however, placed a "substantial" burden on Congress. *Ibid.*[28] Relief from the burdens of that "notoriously clumsy" private bill system, *Dalehite*, 346 U.S. at 25, so that Congress could instead "devote more time to major public issues" was, as the Court has

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[28] The data surveyed by the Court in *Dalehite* shows that, over the two decades that Congress considered tort claim legislation, between approximately 1,600 and 2,300 private claim bills were introduced in *each* Congress. 346 U.S. at 25 n.9.

observed, Congress' "overwhelming purpose" for the Act, *Yellow Cab*, 340 U.S. at 549-50.[29]

At the same time, the Act "avoid[ed] injustice to those having meritorious claims hitherto barred by sovereign im-

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[29] The legislative history confirms that Congress' overarching purpose for the FTCA was to curtail the private bill system. The 79th Congress that enacted the FTCA repeatedly expressed concerns that the private bill system was "unduly burdensome to the Congress and * * * unjust to the claimants." H.R. Rep. No. 1287, *supra*, at 3; accord, LRA Explanation, *supra*, at 35; S. Rep. No. 1400, *supra*, at 30; see also S. Rep. No. 1011, 79th Cong., 2d Sess. 24-25 (1946) ("Congress is poorly equipped to serve as a judicial tribunal for the settlement of private claims against the Government of the United States. This method of handling individual claims does not work well for either the Government or for the individual claimant.").

Earlier Congresses, reaching back as far as when tort claim legislation was first proposed in the 69th Congress, expressed identical sentiments. See H.R. Rep. No. 206, 69th Cong., 1st Sess. 1-3, 8-14 (1926); H.R. Rep. No. 667, 69th Cong., 1st Sess. 1-3, 8-14 (1926); S. Rep. No. 14, 69th Cong. 1st Sess. 2, 7 (1926); H.R. Rep. No. 286, 70th Cong., 1st Sess. 1-3 (1928); H.R. Rep. No. 1699, 70th Cong., 2d Sess. 3-4 (1929); S. Rep. No. 766, 71st Cong., 2d Sess. 1-2 (1930); H.R. Rep. No. 2800, 71st Cong., 3d Sess. 2-8 (1931); S. Rep. No. 658, 72d Cong., 1st Sess. 2, 4 (1932); H.R. Rep. No. 2428, *supra*, at 2; S. Rep. No. 1196, *supra*, at 5; H.R. Rep. No. 2245, *supra*, at 5-6; 1942 Hearing, *supra*, at 49-55 (collecting criticisms of the private bill system). So too did the Executive – both President Roosevelt himself and the Department of Justice. See H.R. Doc. No. 562, 77th Cong., 2d Sess. 1-2 (1942) (message dated Jan. 14, 1942, from President Roosevelt) (asserting that tort claim legislation "would be of real assistance to the Congress and to the President at a time when matters of grave national importance demand an ever-increasing share of our attention"); Department of Justice, *Tort Claims Against the United States: An Analysis of S. 2221*, 77th Cong., 2d Sess. 3 (Comm. Print 1942) [hereinafter "1942 DOJ Analysis"] ("By removing a large number of private tort claims from Congress and the Claims Committees, it will give the National Legislature more time to devote to matters of wider importance, and will thereby benefit the public as well as claimants and Members of Congress.").

munity," *Muniz*, 374 U.S. at 154, by "affording * * * easy and simple access to the federal courts for torts within [the Act's] scope," *Dalehite*, 346 U.S. at 25. Notwithstanding Congress' "feeling that the Government should assume the obligation to pay damages for the misfeasance of employees carrying out its work," there were certain classes of claims for which the FTCA's waiver of sovereign immunity was either undesirable or unnecessary. *Ibid.* Congress' enactment of the thirteen § 2680 exceptions was the resulting accommodation.

2. In *Kosak*, the Court identified three "general purposes" behind Congress' preservation of sovereign immunity through the thirteen § 2680 exceptions: (1) "ensuring that 'certain governmental activities' not be disrupted by the threat of damage suits;" (2) "avoiding exposure of the United States to liability for excessive or fraudulent claims;" and (3) not "extending the coverage of the Act to suits for which adequate remedies were already available." 465 U.S. at 858 & n.17. Of particular relevance here, the Court has repeatedly suggested that Congress' "*only* arguably relevant" purpose for enacting *§ 2680(c)* was to avoid "extending the coverage of the Act to suits for which adequate remedies were already available."[30] *Kosak*, 465 U.S. at 858 & n.17 (emphasis

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[30] The FTCA's legislative history reinforces that the three "general purposes" underlying the § 2680 exceptions are alternative, such that only one will often support a particular exception. See LRA Explanation, *supra*, at 38 (providing that the exceptions were designed to "cover claims which relate to certain governmental activities which should be free from the threat of damage suit, *or* for which adequate remedies are already available" (emphasis added)); S. Rep. No. 1400, *supra*, at 33 (same); H.R. Rep. No. 1287, *supra*, at 6 (same); S. Rep. No. 1196, *supra*, at 7 (same); H.R. Rep. No. 2245, *supra*, at 10 (same). Even the Department of Justice understood the purposes for the § 2680 exceptions to be alternative. See 1942 DOJ Analysis, *supra*, at 2 (providing that the exceptions "relate to certain governmental activities which should be free from the restraint of damage suits, *or* in respect of which adequate remedies are already available" (emphasis

added); see also *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427 n.5 (1995) (listing § 2680(c) among those FTCA exceptions that "are for cases in which other compensatory regimes afforded relief"); *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 462 n.4 (1980) (*per curiam*) ("[T]he purpose of § 2680(c) was to avoid duplication; there was no indication that existing remedies, if any, were withdrawn.").[31]

3. The FTCA's legislative history supports the Court's repeated suggestion that Congress enacted § 2680(c) with only the third general purpose – to avoid creating a duplicative remedy – in mind. There is nothing in the Act's legislative history to the contrary.

With respect to early tort claim bills, which contained a customs and tax exception for only "claim[s] arising in respect of the assessment or collection of any tax or customs duty" (see page 26, *supra*), Congress repeatedly observed

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added)); 1942 Hearing, *supra*, at 33 (testimony of Francis M. Shea, Asst. Att'y Gen.) (same).

[31] Commentators who analyzed the FTCA shortly after its enactment likewise agreed that what is now § 2680(c) was enacted to avoid creating a duplicative remedy. See Walter Gellhorn & C. Newton Schenck, *Tort Actions Against the Federal Government*, 47 Colum. L. Rev. 722, 730 (1947) (listing LRA § 421(c) among exceptions "relat[ing] to types of claims for which other legislative provision has been made"); Irvin M. Gottlieb, *The Federal Tort Claims Act – A Statutory Interpretation*, 35 Geo. L. Rev. 1, 45 (1946) ("The basis for the exception of Section 421(c) lies in the existence of an adequate, subsisting remedy upon which suits against the United States have heretofore been entertained. Its specific enumeration serves to avoid ambiguity, especially in view of the courts allowing suit for recovery of duties wrongfully and tortiously assessed, and for income taxes which had been wrongfully assessed."); Yale L. J. Note, *supra*, at 547 (listing LRA § 421(c) among exceptions enacted "because of satisfactory provisions already made for handling the claims covered"); see also 2 Jayson & Longstreth, *supra*, § 13.02, at 13-8 (explaining that "Congress was satisfied that 'adequate remedies are already available' for claims" covered by what is now § 2680(c)).

that the exception was designed "to exclude * * * certain classes of claims for which satisfactory relief is available under existing law." H.R. Rep. No. 206, *supra*, at 4; H.R. Rep. No. 667, *supra*, at 4 (same); H.R. Rep. No. 286, *supra*, at 4; H.R. Rep. No. 2800, *supra*, at 9 (reporting that "settlements are provided by other statutes" for claims arising out of "[t]he assessment or collection of any tax or customs duty").

Even after Congress began to consider tort claim bills containing Judge Holtzoff's "expanded" customs and tax exception, the explanation of the exception's purpose remained constant. Col. O.R. McGuire, Counsel to the General Accounting Office of the Comptroller General, testified before a subcommittee of the House Claims Committee that injuries covered by the "expanded" exception were already "taken care of under the taxation and customs laws, and the Government does not want to provide for a tort action in those instances, because there is a civil action that would take care of the situation to a large extent." 1932 Hearing, *supra*, at 18 (testimony of Col. O.R. McGuire, Counsel to the General Accounting Office of the Comptroller General) (discussing H.R. 5065, *supra*, § 206(2)).[32] Similarly, Judge Holtzoff himself, in testimony before a subcommittee of the Senate Judiciary Committee, identified[33] the existence of other remedies as the only reason for the exception. See *Tort Claims Against the United States: Hearing on S. 2690 Before a Sub-*

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[32] Col. McGuire's testimony, as counsel to the Comptroller General, was highly relevant because, as already explained (page 26 & note 23, *supra*), H.R. 5065 represented a composite of the views of the Department of Justice and the General Accounting Office of the Comptroller General. Although his reference to an existing civil action was not specific, it was likely to the traditional common law remedy against individual customs and tax officers. See pages 39-45, *infra*.

[33] As already explained (pages 27-28, *supra*), the Court has given "significant" weight to Judge Holtzoff's interpretations of what is now § 2680(c).

comm. of the S. Judiciary Comm., 76th Cong., 3d Sess. 38 (1940) [hereinafter "1940 Senate Hearing"] (testimony of Alexander Holtzoff, Special Asst. to the Att'y Gen.) (discussing S. 2690, *supra*, § 303(2)).[34] Although Col. McGuire's and Judge Holtzoff's testimony are the only two statements of purpose for the "expanded" exception enacted by Congress, nobody – not Judge Holtzoff, Col. McGuire, any other witness, or any Member of Congress – articulated any contrary purpose.

The one-sidedness of the customs and tax exception's legislative history, both before and after Judge Holtzoff expanded the exception, fully supports the Court's repeated suggestion that Congress' "only arguably relevant" purpose for enacting it was to avoid "extending the coverage of the Act to suits for which adequate remedies were already available."[35]

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[34] In his analysis of S. 2690's "expanded" customs and tax exception, Judge Holtzoff testified that "various tax laws" already "provid[ed] the machinery for recovering back any tax that has been paid but was not properly owing" and that "[t]here was no purpose in interfering with that machinery." 1940 Senate Hearing, *supra*, at 38. The Court was, of course, correct when it observed in *Kosak*, that Judge Holtzoff "emphasized the adequacy of existing remedies as a justification for the portion of the provision pertaining to the recovery of improperly collected taxes [but] did not proffer an explanation for the portion of the provision pertaining to the detention of goods." 465 U.S. at 858 n.17. This does not detract, however, from the fact that *every* statement of purpose for enacting the customs and tax exception in the FTCA's entire legislative history stressed exclusively the existence of other remedies.

[35] To be sure, the Court in *Kosak*, considered each of the three "general purposes" underlying Congress' enactment of the § 2680 exceptions. 465 U.S. at 858 n.16. But it did so "merely to ensure that [its] construction [was] not undercut by any indication that Congress meant the exception" to be applied differently – not because each must apply to § 2680(c). *Ibid.*; cf. *id.* at 865-66, 869 (Stevens, J., dissenting) (criticizing the United States' reliance on and questioning the relevance of the other two "general purposes" behind certain § 2680

4. Congress was undoubtedly aware of – indeed, repeatedly enacted statutes assuming – the availability of common law suits against revenue collectors and other officers engaged in customs and tax activities but not law enforcement officers generally. Such suits are likely what Congress considered to be the "adequate remedies * * * already available," *Kosak*, 465 U.S. at 858, when, in an effort to avoid creating a duplicative remedy, it enacted § 2680(c). See pages 35-38, *supra*.

As the Court observed in *Kosak*, "[a]t common law, a property owner had (and retains) a right to bring suit against an individual customs official who negligently damaged his goods." 465 U.S. at 860; see also *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146, 1149 (CA4 1974) (allowing common law claim for damages against individual customs officers resulting from their detention of goods); *Dioguardi v. Durning*, 139 F.2d 774, 775 (CA2 1944) (same). The same is true with respect to tax collectors. Both customs and tax collectors were, at common law, considered "quasi-bailees" of property detained for violations of the revenue laws.[36] See Joseph Story, *Commentaries on the Law of Bailments* §§ 613, 618, at 623, 625 (8th ed. 1870).

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exceptions); *Dolan*, 126 S. Ct. at 1258-59 (rejecting the United States' arguments as to how a broad construction of § 2680(b) is best served by resort to the other two "general purposes"). Whatever the relevance of Congress' other two "general purposes" to the issue before the Court in this case, they are appropriately served by the narrow construction of § 2680(c) advanced by petitioner, which is faithful to Congress' decision to leave in place the traditional (and more restrictive) common law remedy for property damage by customs and tax officials. See note 38, *infra*.

[36] Since the earliest days of the Republic, Congress has assumed that revenue collectors were quasi-bailees of the property they seize. As early as 1799, Congress provided that if, in a forfeiture proceeding, judgment is entered for the claimant, the seized property must be returned by the collector "forthwith." Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695. This recognition of revenue collectors' quasi-bailee

If property was properly seized by the collector and forfeited to the government, the claimant was not, of course, entitled to its return. But if the property was not forfeited, revenue collectors could be held "liable in their individual capacities for tortious conduct committed in the performance of their duties," including the loss of or damage to non-forfeited property. *States Marine Lines*, 498 F.2d at 1149. Specifically, if the underlying seizure of property was "without a justifiable cause," the collector could be held strictly liable "for all loses and damages" under a theory of conversion or trespass. Story, *supra*, § 613, at 625. In such a case, the collector may even be personally liable for consequential damages arising out of the seizure. See *Agnew v. Haymes*, 141 F. 631, 641 (CA4 1905). If the seizure was justifiable (albeit ultimately held to have been erroneous), the collector's liability was limited under a negligence theory for breach of the "official obligation, as imposed by law," to exercise "reasonable diligence" in the performance of the duties of office. *United States v. Thomas*, 82 U.S. (15 Wall.) 337, 342-343 (1873); see also Story, *supra*, § 613, at 625 (observing that "[i]f the seizure is for a justifiable cause, [revenue officers] are responsible only for losses and damages occasioned by the want of ordinary diligence"); *Agnew*, 141 F.3d at 641.

5. Two sets of protective enactments designed to remedy the unjust result of collectors being personally liable for carrying out their official duties demonstrate Congress' awareness of the availability of (and comfort with) the common law suit against individual customs and tax officers. First, in 1815, Congress adopted a statute allowing "any collector, naval officer, surveyor, inspector, or any other officer, civil, or military" sued in state court for "any thing done, or omitted to be done as an officer of customs" to remove the

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status was in effect when the FTCA was enacted and remains in effect today. See 28 U.S.C. 818 (1940) (now codified as amended at 28 U.S.C. 2465).

case to federal court. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198. Congress then expanded the protection in 1866 to allow removal by officers acting under the internal revenue laws. See Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171 (extending the removal protection to "any officer of the United States" sued "on account of any act done" under the internal revenue laws).[37] About the same time, Congress entitled any "collectors or other officers of the revenue" sued for "any act done by them" to indemnification by the Treasury, so long as a federal court certified that the collector had acted either with probable cause or "under the directions of the Secretary of the Treasury or other proper officer of the government." Act of Mar. 3, 1863, ch. 76, § 12, 12 Stat. 737, 741. As the Court has recognized, this removal and indemnification process effectively "convert[ed] the suit against the collector into a suit against the government." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 381 (1933) (Cardozo, J.) (citing *United States v. Sherman*, 98 U.S. (8 Otto) 565, 567 (1878)); see also *Andrews*, 441 F.3d at 225 ("The effect of this statutory indemnification is to skirt the United States' sovereign immunity by providing a back-door entry to the federal fisc to obtain monetary damages: the historical suit is against a tax or customs officer, but the United States pays the judgment.").

This framework was in place when Congress enacted the FTCA in 1946 and remains in place today. See 28 U.S.C. 76 (1940) (removal provision) (now codified as amended at 28 U.S.C. 1442(a)(1)); 28 U.S.C. 842 (1940) (indemnification provision) (now codified as amended at 28 U.S.C. 2006). Thus, when Congress exempted from the FTCA claims "arising in respect of * * * the detention of any goods or merchandise by

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[37] For a discussion of these early removal statutes, see *Tennessee v. Davis*, 100 U.S. (10 Otto) 257, 167-69 (1879), and *City of Philadelphia v. The Collector*, 72 U.S. (5 Wall.) 720, 728-29 (1867).

any officer of customs or excise or any other law enforcement officer," LRA § 421(c), 60 Stat. at 845, tort plaintiffs

> already had another way to recover from the government for the actions of customs officers, tax officers, and other officers acting under the customs and tax laws. Those plaintiffs did not need the waiver of sovereign immunity provided by the FTCA. For them, "adequate remedies" were "already available."

Bazuaye, 83 F.3d at 485.

But, as the D.C. Circuit aptly observed, "[t]he same could not be said for plaintiffs injured by federal law-enforcement officers acting outside the authority of the customs and tax laws." *Ibid.* The indemnification procedure was available only to "*a collector or other revenue officer*" acting "under the directions of the Secretary of the Treasury or other proper officer of the Government" – in other words, customs and tax collectors and other officers acting in a customs or tax capacity. 28 U.S.C. 842 (1940) (emphasis added) (now codified as amended at 28 U.S.C. 2006).

> No federal statute indemnified federal officers for actions taken outside the customs and tax contexts. Plaintiffs injured by such actions could not recover from the government indirectly through a fictional "personal" suit against the individual officer, and the sovereign immunity of the United States barred them from recovering in a suit against the government itself. Unlike plaintiffs injured by officers acting under the tax and customs laws, then, plaintiffs injured by federal officers acting in general law-enforcement capacities had no way to recover in a suit against the government itself.

Bazuaye, 83 F.3d at 485-86 (footnote omitted); see also *Andrews*, 441 F.3d at 225 ("[A]t the time of the FTCA's enactment, plaintiffs enjoyed no similar right to sue law enforce-

ment officers acting outside a customs or tax enforcement capacity.").[38]

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[38] As already explained, the relevance to this case of Congress' other two "general purposes" for enacting the § 2680 exceptions is dubious. See pages 33 & 35-38, *supra*. But whatever their relevance, they are appropriately served by the narrow construction of § 2680(c) advanced by petitioner.

The assessment and collection of duties and taxes is "the life-blood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935); see also *West India Oil Co. v. Domenech*, 311 U.S. 20, 25 (1940) (stressing the "importance in the administration of the customs laws of the United States and of the revenue laws"). Indeed, over the twenty years that Congress considered tort claim legislation, between 88% and 98% of the federal government's annual revenue came from taxes and customs duties. See U.S. Bureau of Census, *Historical Statistics of the United States: Colonial Times to 1970*, at 1122 (1976). It is precisely because of the paramount importance of such revenue collection functions that revenue officers have, "[s]ince the founding of our Republic," been allowed to search and seize property without a warrant or probable cause. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); see also *Bull*, 295 U.S. at 259.

The narrow context-based construction of § 2680(c) offered by petitioner does nothing to threaten these "life-blood" governmental functions. As the Court recognized in *Kosak*, "there are significant limitations to the common-law remedy" that Congress preserved for suits against customs and tax officers. 465 U.S. at 860. "The most important" of these limitations is the "requirement that the plaintiff prove negligence on the part of a particular customs official" because "[s]uch proof will often be difficult to come by" and, thereby, limit the number of suits filed and the prospect of a plaintiff's recovery. *Id.* at 860-61. Suits under the FTCA, in contrast, require the plaintiff to demonstrate negligence on the part of the government *en masse*, which is necessarily less demanding. Thus, by allowing claims against customs and tax officers and other law enforcement officers acting in revenue collection capacities to continue under the more restrictive common-law mechanism instead of the FTCA, Congress appropriately shielded the important governmental "power to detain goods owned by suspected violators" of customs and tax laws from "disrupt[ion] by the threat of damage suits" and "exposure * * * for excessive or

Accordingly, including federal officers acting in general law-enforcement capacities (like respondents) within the reach of § 2680(c) would, "at the time of the FTCA's enactment, not have denied plaintiffs a duplicate remedy, but rather would have denied them any remedy at all,"[39] *Andrews*, 441 F.3d at 225, and "swallow up Congress' waiver of sovereign immunity, given the potential number of law en-

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fraudulent claims." *Kosak*, 465 U.S. at 858-59; see also *id.* at 861 n.24 (positing that "Congress may well have feared that the creation of a remedy under the [FTCA] would have increased the liability of the United States to such a degree as to curtail the exercise by the [customs and revenue] service[s] of [their] authority to detain goods").

[39] Since 1922, Congress has authorized agency heads to settle, for not more than $1000, claims involving the negligence of governmental employees. See Act of Dec. 28, 1922, ch. 17, § 2, 42 Stat. 1066 (codified as amended at 31 U.S.C. 3723). This administrative settlement applies to loss of a prisoner's property by the negligence of a BOP officer, see 31 U.S.C. 3723 (allowing "[t]he head of an agency" to "settle a claim * * * for damage to, or loss of, privately owned property * * * caused by the negligence of an officer or employee of the United States Government"), but it does not allow a judicial suit and provides only limited recovery. Accordingly, it has never been considered duplicative of the remedy available through the FTCA. See *Dolan*, 126 S. Ct. at 1259 (rejecting the government's argument that administrative remedies "permit[ting] only discretionary relief" are duplicative of FTCA remedies); see also *Bazuaye*, 83 F.3d at 486 n.3. While other statutory or judicially-created remedies "may *now* exist" for certain plaintiffs like petitioner, there were no such other remedies in existence at the time of the FTCA's enactment through which they could receive payment from the federal fisc. *Andrews*, 441 F.3d at 225 n.5 (emphasis added); see also Sarah Lahlou-Amine, Note, *The Improper Expansion of Law Enforcement Officers' Immunity Under the Federal Tort Claims Act Detention of Property Provision: Why Immunity Should Not Extend to Bureau of Prisons Officials*, 35 Stetson L. Rev. 559, 564-68 (2006) (noting the unavailability of other remedies); cf. *Carlson*, 446 U.S. at 19-20 (holding that FTCA and *Bivens* remedies were "parallel, complementary causes of action," such that the availability of the former did not preempt the latter, but observing that the FTCA was "was enacted long before *Bivens* was decided").

forcement officials in our modern government's alphabet soup," *Ortloff*, 335 F.3d at 659.

6. Finally, leaving no remedy to individuals whose property was detained and subsequently lost or damaged by federal officers acting in general law enforcement capacities would subvert the purpose of the FTCA as whole, which as already discussed (pages 33-34, *supra*), was to transfer the responsibility for adjudicating and settling tort claims from congressional claims committees to the judiciary. Where an adequate pre-existing remedy was available, such as a common law suit against an individual customs or tax officer, Congress was unlikely to be burdened by a private claim bill. The same is true for classes of claims not barred by one of the § 2680 exceptions and, therefore, actionable under the Act. But where neither remedy was available, Congress would be (and remains today) the only forum for relief. See, *e.g.*, H.R. Rep. No. 188, 102d Cong., 1st Sess. (1991) (recommending passage of a private claim bill to compensate boat owner for damage by customs officers because barred by § 2680(c)). The broad reading of § 2680(c) advanced by the court of appeals below leaves plaintiffs with claims arising out of the detentions of property by law enforcement officers acting outside the customs and tax contexts with neither remedy and, therefore, returns Congress to the precise peril that it sought to avoid.[40]

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[40] The Court has already observed that, in seeking to alleviate the burdens of private claim bills, Congress was "well aware of" the "large[] number of private bills" introduced on behalf of federal prisoners (like petitioner), which "were * * * among those adding to Congress' burdens." *Muniz*, 374 U.S. at 153-54. In light of Congress' overarching purpose for enacting the FTCA, it would have been strange for Congress to enact simultaneously a detention of property exception that precluded the transfer of federal prisoner claims to the judiciary.

IV. THE CIVIL FORFEITURE-FOCUSED AMENDMENTS TO § 2680(C) IN 2000 ARE IRRELEVANT TO THIS CASE

In 2000, Congress amended § 2680(c) through its enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202. The amendment added to the end of § 2680(c)'s original language the following:

> except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—
>
> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> (2) the interest of the claimant was not forfeited;
>
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

CAFRA § 3(a)(3), 114 Stat. at 211. This new clause created an "exception to the exception" by waiving the United States' sovereign immunity for a subset of previously barred property claims arising in connection with asset forfeitures.[41]

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[41] CAFRA also altered the original language of § 2680(c). The amendment struck the words "any goods or merchandise" and replaced them with the words "any goods, merchandise, or other property." CAFRA § 3(a)(1), 114 Stat. at 211. Why Congress did so is un-

The language added to the statute through this amendment plainly has no application to petitioner because his property was not detained "for the purpose of forfeiture." 28 U.S.C. 2680(c)(1). The viability of petitioner's claim, therefore, depends (as it would if CAFRA had never been enacted) exclusively on the meaning of the phrase "any other law enforcement officer" in § 2680(c)'s detention of property clause, which is original to the FTCA's 1946 enactment.[42] See *Dahler v. United States*, 473 F.3d 769, 772

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clear, although it was likely to remedy the fact that neither real property nor currency are "goods or merchandise." See *Black's Law Dictionary*, *supra*, at 714 (defining "goods" as "[t]angible or movable personal property other than money"); *id.* at 1008 (defining "merchandise" as "a movable object" and noting that the definition "generally excludes * * * real estate" and "does not apply to money"). Whatever Congress' reason, respondents cannot possibly suggest that the amendment evinces an intention to broaden the class of law enforcement officers to which § 2680(c)'s detention clause applies. Customs and tax officers have long been able to detain and seize real property and currency. See 26 U.S.C. 7608(a)(4) (authorizing internal revenue enforcement officers to "make seizures of property subject to forfeiture"); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993) (seizure of home by customs officers); *United States v. $8,850*, 461 U.S. 555 (1983) (seizure of currency by customs officers). The addition of "other property" to the end of the detention clause appears to simply recognize that long-established authority.

[42] While Congress was crafting CAFRA, it had a chance to expressly adopt a construction of § 2680(c)'s detention of property clause that would bar petitioner's claim, but it declined to do so. After the Sixth Circuit issued its decision in *Kurinsky*, 33 F.3d at 598, which was the first appellate decision to adopt the narrow construction of the detention-clause, the Department of Justice quickly set out to have Congress abrogate it. In a bill drafted by the Department and transmitted to Speaker Gingrich, the Department urged Congress to amend the detention clause to bar claims "arising in respect of the * * * detention of any goods or merchandise, or other property *by any law enforcement officer performing any official law enforcement function*." *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Judiciary Comm.*, 104th Cong., 2d Sess. 51-52, 126-27 (1996)

(CA7 2007) (*per curiam*) ("The text of CAFRA says nothing about the type of activities in which law enforcement officers must be engaged in order for § 2680(c) *to initially apply and thus immunize the government from suit.*" (emphasis added)); see also *Andrews*, 441 F.3d at 226-27 & n.8 (refusing to construe § 2680(c)'s detention of property clause in light of CAFRA).

Respondents suggested at the petition stage that the CAFRA amendment may be relevant here because it "underscores [§ 2680(c)'s] breadth." Resp. Cert. Br. 6-7. That suggestion is misplaced. As the Court has repeatedly held, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 165 n.27 (1983) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 118 n.13 (1980)); accord, *United States v. Price*, 361 U.S. 304, 313 (1960). Accordingly, "it is the intent of the Congress that enacted [the "any other law enforcement officer" phrase] * * * that controls." *International Bhd. of Teamsters*, 431 U.S. at 354 n.39; accord, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979); see also *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 839-40

(draft bill and accompanying "Section-by-Section" analysis) (emphasis added). After adding to it an express incorporation of § 2680(h)'s broad definition of "investigative or law enforcement officer," Representative Schumer introduced the bill as H.R. 1745, *supra*, § 106. Congress, of course, never enacted H.R. 1745, and instead opted to leave § 2680(c)'s "any other law enforcement officer" phrase unchanged. To the extent that the Court deems it appropriate to look to CAFRA or its legislative history at all, the most relevant evidence of Congress' intent is its failure to enact H.R. 1745, which indicates its desire to allow the narrow interpretation of § 2680(c) (such as the Sixth Circuit's in *Kurinsky*) to continue. See, *e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (finding significant "a refusal by Congress to overrule a[] construction of legislation * * * where the [] construction has been brought to Congress' attention through legislation specifically designed to supplant it").

(1988); *United Air Lines, Inc. v. McCann*, 434 U.S. 192, 200 n.7 (1977); *Andrews*, 441 F.3d at 227 n.8. As petitioner has demonstrated throughout this brief, § 2680(c)'s text, legislative history, and underlying purpose all evince that the Congresses that originally considered and the Congress that eventually enacted what is now § 2680(c) did not intend the provision to bar a claim like petitioner's.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2007

APPENDIX

STATUTORY APPENDIX

1. 28 U.S.C. 1346(b)(1) provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2674 provides:

The United States shall be liable, respecting the pro visions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory dam ages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which other wise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section ap plies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been avail able to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

3. 28 U.S.C. 2680 provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[1]

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

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[1] So in original.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

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(5)

May 2, 2007

No. 06-9130

IN THE SUPREME COURT OF THE UNITED STATES

ABDUS-SHAHID M.S. ALI, PETITIONER

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether a prisoner's claim under the Federal Tort Claims Act that prison guards mishandled his property during an inter-prison transfer is barred by 28 U.S.C. 2680(c), which precludes the government's liability in tort for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer."

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported. The order of the district court dismissing the complaint (Pet. App. 8a-21a) is also unreported.

JURISDICTION

The court of appeals entered its judgment on October 19, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, waives the United States' sovereign immunity and renders the United States liable in damages for the

> negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the

> United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b)(1).

Congress, however, expressly excluded from that waiver of liability:

> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.

28 U.S.C. 2680(c), as amended by the Civil Asset Forfeiture Reform Act of 2000 (Reform Act), Pub. L. 185, § 3(a), 106th Cong., 2d Sess., 114 Stat. 211. Congress then narrowed that "detention of goods" exception to preserve liability for a subset of claims arising out of forfeitures, specifying that

> the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer if --
>
> > (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
> >
> > (2) the interest of the claimant was not forfeited;
> >
> > (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
> >
> > (4) the claimant was not convicted of a crime for which the interest of the claimant

> in the property was subject to forfeiture under a Federal criminal forfeiture law.

28 U.S.C. 2680(c).

2. Petitioner is a federal prisoner. He is currently incarcerated at the United States Penitentiary in Inez, Kentucky. In December 2003, the Bureau of Prisons transferred petitioner from a federal penitentiary in Atlanta, Georgia, to the Inez facility. Prior to that transfer, petitioner was required to deliver his personal property to the Atlanta penitentiary's Receiving and Discharge Unit (Unit) for transfer to Inez. Petitioner alleges that, due to insufficient staffing at the Unit, he was told to leave his personal property with the Unit without an inventory being completed. Pet. App. 9a-10a.

Petitioner further alleges that, when his property arrived at the Inez facility, some items were missing, including two copies of the Qur'an, a prayer rug, stamps, locks, and some clothing. He claims that officers told him that, if he wished to receive his property, he had to sign a form acknowledging receipt of his property, and further that he could file a federal tort claim concerning any missing items. Pet. App. 10a-11a.

Petitioner subsequently filed an administrative tort claim with the Bureau of Prisons, which was denied in August 2004. Pet. App. 12a-13a.

3. Petitioner filed suit in district court against the federal Bureau of Prisons and prison officials in both their

official and individual capacities, asserting claims under the FTCA, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb et seq., and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc et seq. He also asserted violations of his constitutional rights under the First, Fourth, and Fifth Amendments, see Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). In addition to recovery for the value of his lost property, petitioner sought compensatory damages of $125,000 from the United States and $50,000 from each individual defendant, $30,000 in punitive damages from each individual defendant, and injunctive relief. Pet. App. 13a-14a & n.4.

The district court dismissed petitioner's complaint. Pet. App. 8a-21a. The district court held that petitioner's FTCA claim was barred by Section 2680(c)'s exception for the detention of goods by law enforcement officers. Pet. App. 15a-17a. The court then dismissed petitioner's remaining claims without prejudice for failure to exhaust administrative remedies. Id. at 17a-21a.

4. In an unpublished decision, the court of appeals affirmed in part and vacated the district court's judgment in part. Pet. App. 1a-7a. The court first affirmed the dismissal of petitioner's FTCA claim, ruling that petitioner's case fell within the "detention of goods" exception, 28 U.S.C. 2680(c). Pet. App. 3a-5a. Relying on the Eleventh Circuit's prior decision in Schlaebitz

v. United States Department of Justice, 924 F.2d 193 (1991), the court held that Bureau of Prisons officials are "law enforcement officers" within the meaning of Section 2680(c), and that claims like petitioner's for damages arising from the "negligent storage or handling" of property fall within the exception's plain scope. Pet. App. 4a (citing Kosak v. United States, 465 U.S. 848, 854-859 (1984)).

With respect to petitioner's non-FTCA claims, the court of appeals vacated the district court's order of dismissal. The court concluded that the record was "unclear whether [petitioner] was in fact misled by prison officials" into believing that his FTCA administrative complaint also exhausted his non-FTCA claims, making disposition of that issue on a motion to dismiss inappropriate. Pet. App. 6a-7a. The court accordingly remanded the case to the district court for further proceedings on petitioner's claims under Bivens, the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act. Id. at 7a.[1]

DISCUSSION

Petitioner contends (Pet. i, 8-24) that this Court's review is warranted to resolve a conflict in the circuits on the question whether the exception to the FTCA's waiver of sovereign immunity for the detention of goods by law enforcement officers, 28 U.S.C.

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[1] According to the U.S. Attorney's Office in Atlanta, Georgia, the proceedings on remand are currently going forward with discovery. Motions for summary judgment are due on July 30, 2007.

2680(c), applies to detentions of property by prison officials, or instead applies only to detentions of property by officers acting in an excise or customs capacity.[2] The government agrees that there is a conflict in the circuits, and that, at this point, the conflict is highly unlikely to dissipate through further consideration of the issue in those or other circuits. Furthermore, as evidenced by the volume of court of appeals decisions, the issue is a recurring one. Therefore, the government does not oppose granting the petition for a writ of certiorari, despite the interlocutory posture of this case.

1. In Kosak v. United States, 465 U.S. 848 (1984), this Court left open the question of what kind of law enforcement officers, other than customs and tax officials, are covered by the reference to "any other law enforcement officer" in Section 2680(c). Id. at 852 n.6. The Court thus did not resolve whether the exception applies, as its text provides, to "any other law enforcement officer" (emphasis added), or whether, notwithstanding that text, Section 2680(c) is limited to officers acting in a tax or customs capacity.

Since this Court's decision in Kosak, Congress has amended Section 2680(c)'s "detention of goods" exception in a manner that

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[2] Petitioner does not separately seek this Court's review of the court of appeals' determination (Pet. App. 4a) that his claim involves the "detention" of goods, within the meaning of Section 2680(c) and this Court's decision in Kosak.

underscores the exception's breadth. In 2000, the Reform Act expanded the exception to apply explicitly to the detention of "any * * * other property," and not just to the detention of "any goods [or] merchandise." See Pub. L. 185, § 3(a), 106th Cong., 2d Sess., 114 Stat. 211. In addition, the Reform Act amendments carved out of the exception claims arising from the seizure of property under "any" provision of federal law providing for forfeiture, if certain conditions are satisfied. See ibid. Congress's enactment of that provision presupposes that, but for such a change in the law, the forfeitures undertaken by a broad variety of federal law enforcement agencies -- not just customs and tax officials -- would have been categorically excepted from FTCA coverage. See H.R. Rep. No. 192, 106th Cong., 2d Sess. 8-9, 18 (1999) (noting that "[t]he federal government is exempted from liability under the Federal Tort Claims Act for damage to property while detained by law enforcement officers," and thus that the FTCA would not permit, e.g., a suit for damage to a private airplane seized by Drug Enforcement Agency officers as part of a domestic drug investigation).[3]

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[3] Federal agents are empowered to seize and forfeit goods in a wide variety of circumstances beyond customs or excise enforcement. See, e.g., 21 U.S.C. 881 (forfeiture and seizure by the Attorney General of property used in the manufacture and sale of controlled substances); 21 U.S.C. 334 (seizure of misbranded, counterfeit, and adulterated foods, drugs, and cosmetics); 18 U.S.C. 981 (forfeiture of property involved in specified crimes).

2. The courts of appeals have issued conflicting decisions on the question of the scope of Section 2680(c)'s application to the detention of goods by law enforcement officers. Five courts of appeals, including the court below, have held that the exception reaches all detentions by law enforcement officers, not just those done by customs and tax officials. See Pet. App. 3a-4a; Chapa v. Department of Justice, 339 F.3d 388, 390 (5th Cir. 2003); Bramwell v. Bureau of Prisons, 348 F.3d 804, 807 (9th Cir. 2003), cert. denied, 543 U.S. 811 (2004); Hatten v. White, 275 F.3d 1208, 1210 (10th Cir. 2002); Schlaebitz v. Department of Justice, 924 F.2d 193, 195 (11th Cir. 1991); Ysasi v. Rivkind, 856 F.2d 1520, 1525 (Fed. Cir. 1988).[4]

Four circuits have limited the exception to the tax and customs context. Two of those cases involved the version of Section 2680(c) that predated the Reform Act amendments in 2000. See Kurinsky v. United States, 33 F.3d 594, 598 (6th Cir. 1994), cert. denied, 514 U.S. 1082 (1995); Bazuaye v. United States, 83

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[4] Prior to the 2000 amendments, the Second and Eighth Circuits likewise applied Section 2680(c) to cases that did not involve customs or excise officers, but they did so without expressly addressing the question raised here concerning the reach of the phrase "any other law enforcement officer." Formula One Motors, Ltd. v. United States, 777 F.2d 822, 823-824 (2d Cir. 1985) (drug enforcement agents); Cheney v. United States, 972 F.2d 247, 248 (8th Cir. 1992) (per curiam) (narcotics agents). The Third Circuit has also suggested, in dicta, that a claim against the FBI for property damage "might have been barred" under Section 2680(c). United States v. Bein, 214 F.3d 408, 416 (3d Cir. 2000), cert. denied, 534 U.S. 943 (2001).

F.3d 482, 486 (D.C. Cir. 1996). But the Seventh and the Fourth Circuits have each held, in cases involving claims against prison officials arising under the amended version of Section 2680(c), that the exception applies only to officers acting in a tax or customs capacity. See Dahler v. United States, 473 F.3d 769, 771-772 (7th Cir. 2007); Andrews v. United States, 441 F.3d 220, 222-228 (4th Cir. 2006); but see id. at 229-230 (King, J., dissenting).

Of particular relevance here, a number of courts have held, like the court of appeals here (Pet. App. 4a), that the exception extends to Bureau of Prisons officers, posing a square conflict with the Seventh Circuit's decision in Dahler and the Fourth Circuit's decision in Andrews. See Bramwell, supra; Chapa, supra; Greer v. United States, No. 02-3414, 72 Fed. Appx. 793 (10th Cir. Aug. 5, 2003), cert. denied, 541 U.S. 1087 (2004); Hatten, supra.[5]

That conflict is highly unlikely to be resolved without this Court's intervention. The Fourth and Seventh Circuits' recent decisions in Andrews and Dahler demonstrate that Congress's 2000 amendments to the text of Section 2680(c) will not resolve the conflict. Furthermore, both the Fourth and Seventh Circuits denied the government's petitions for rehearing en banc, while acknowledging that their decisions created an inter-circuit

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[5] The issue is currently pending in the Second Circuit. See ABC v. DEF, No. 06-1362 (argued Apr. 23, 2007).

conflict. See Dahler, 473 F.3d at 772; Andrews, 441 F.3d at 228.[6]

The number of cases that have arisen also documents that the issue is a recurring one of importance to both the federal government and to those seeking to bring suits under the FTCA. Restoring uniformity and stability to the interpretation and operation of a federal law is an established basis for this Court to exercise its discretion to grant the petition for a writ of certiorari. See S. Ct. R. 10(a).

That is particularly true when, as here, the question of statutory construction involves a waiver of sovereign immunity. As this Court has long recognized, federal courts have a special duty to ensure both that they do not mistakenly impose burdens on the public fisc that Congress did not authorize, and that "public funds will [only] be spent according to the letter of the difficult judgments reached by Congress as to the common good." OPM v.

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[6] Prior to the emergence of a circuit conflict under the amended version of Section 2680(c), the United States filed a number of briefs opposing the grant of certiorari on this issue. See, e.g., U.S. Br. in Opp. 5-6 & n.3, Rigsby v. United States, 543 U.S. 955 (2004) (No. 03-11038); U.S. Br. in Opp. 8-10, Greer v. United States, 541 U.S. 1087 (2004) (No. 03-8804); see also Pet. 19 n.15. At that time, the United States suggested that Congress's enactment of the Reform Act might result in elimination of the pre-existing circuit conflict as courts reconsidered their position in light of the newly enacted language underscoring the exception's breadth. Since the filing of those briefs in opposition, however, the Fourth Circuit in Andrews and the Seventh Circuit in Dahler have both held in post-amendment cases that the exception remains inapplicable outside the customs and excise context, and both of those courts have denied the government's petitions for rehearing en banc.

Richmond, 496 U.S. 414, 428 (1990); see also U.S. Const. Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

3. Although the question presented merits this Court's review, this case does arise in an interlocutory posture. While the court of appeals held that petitioner's FTCA claim is barred, that court reversed the district court's dismissal of petitioner's alternative claims for relief under the Constitution and the Religious Freedom Restoration Act, 42 U.S.C. 2000bb et seq.[7] The court of appeals remanded those claims to the district court, where discovery is going forward and motions for summary judgment are due on July 30, 2007.

Were petitioner to obtain the monetary relief he seeks under those claims, the court's resolution of the question presented here would be of no practical significance. There is, however, substantial doubt whether petitioner could obtain full relief on remand under those alternative claims. It is the position of the United States that, in light of the dismissal of petitioner's FTCA claim ordered by the court of appeals, the FTCA's judgment bar

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[7] Petitioner also seeks relief under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc et seq. (see Pet. App. 2a), but the institutionalized persons provisions of that statute do not apply to the federal government or to officials acting under color of federal law. See 42 U.S.C. 2000cc-1, 2000cc-5(4).

would foreclose his Bivens claim. See 28 U.S.C. 2676.[8] The impact of the court of appeals' decision on petitioner's Bivens claim weighs in favor of granting review on the FTCA issue despite the interlocutory posture of the case.

While petitioner also seeks relief under RFRA, that claim pertains only to the alleged loss of petitioner's religious property and thus could not provide any sort of relief for his other claimed losses. Moreover, money damages may not be obtained under RFRA in cases against the government, because RFRA's authorization of "appropriate relief," 42 U.S.C. 2000bb-1(c), does not expressly authorize an award of money damages. See Webman v. Federal Bureau of Prisons, 441 F.3d 1022, 1025-1026 (D.C. Cir. 2006); see generally Lane v. Pena, 518 U.S. 187, 192 (1996); United States v. Nordic Village, Inc., 503 U.S. 30, 37, 39 (1992).

Finally, whatever the ultimate disposition of those other

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[8] Cf. Hoosier Bancorp of Indiana, Inc. v. Rasmussen, 90 F.3d 180, 184 (7th Cir. 1996) (judgment bar applies to "all judgments, both against and in favor of the government"); Gasho v. United States, 39 F.3d 1420, 1437-1438 (9th Cir. 1994) (dismissal of earlier FTCA claims bars subsequent Bivens action), cert. denied, 515 U.S. 1144 (1995); but see Hallock v. Bonner, 387 F.3d 147, 154-155 (2d Cir. 2004) (judgment bar does not apply where FTCA claim is barred by an exception under Section 2680(c)), vacated on other grounds, 126 S. Ct. 952 (2006).

The Eleventh Circuit has not yet addressed the question of the jurisdictional bar's application in this context. Last Term, this Court granted review to consider whether the judgment bar applies to dismissals based on an exception to the FTCA's substantive coverage, but the Court did not resolve the issue because it vacated the court of appeals' decision for lack of jurisdiction under the collateral order doctrine. See Will v. Hallock, 126 S. Ct. 952, 957 (2006).

claims, it will not affect petitioner's FTCA claim, which the court of appeals has definitively rejected as a matter of law.

In sum, while the United States does not oppose this Court's granting the petition for a writ of certiorari given the circuit conflict and given the court of appeals' definitive rejection of petitioner's FTCA claim, the Court may prefer to await a case that does not arise in an interlocutory posture. As petitioner notes (Pet. 15), the question recurs with some frequency, and thus other opportunities for review that do not involve interlocutory decisions are likely to arise in short order.

CONCLUSION

The government does not oppose the granting of the petition for a writ of certiorari in this case.

Respectfully submitted.

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MAY 2007

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7198 No. 06-9130

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QUESTION PRESENTED

Whether Bureau of Prisons officials constitute "law enforcement officer[s]" for purposes of the detention-of-property exception to the Federal Tort Claims Act, 28 U.S.C. 2680(c).

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In the Supreme Court of the United States

No. 06-9130

ABDUS-SHAHID M.S. ALI, PETITIONER

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 57-62) is not published in the Federal Reporter, but is reprinted at 204 Fed. Appx. 778. The order of the district court (J.A. 41-56) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2006. On January 17, 2007, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 8, 2007. The petition was filed on January 25, 2007, and granted on May 29, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, is reprinted in an appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, waives the United States' sovereign immunity for suits seeking damages for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of employees of the federal government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The FTCA, however, excepts thirteen categories of governmental activity from that waiver of sovereign immunity. 28 U.S.C. 2680. For example, the FTCA contains exceptions for claims involving the performance of a discretionary function, 28 U.S.C. 2680(a); claims involving the mishandling of mail, 28 U.S.C. 2680(b); and claims arising out of intentional torts, except for claims involving the acts or omissions of investigative or law enforcement officers, 28 U.S.C. 2680(h).

This case concerns the FTCA exception that preserves the federal government's immunity for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. 2680(c). That exception itself contains an exception, which waives the government's immunity for "any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any

officer of customs or excise or any other law enforcement officer," if, among other requirements, "the property was seized for the purpose of forfeiture under any provision of Federal law providing for the [civil] forfeiture of property" and "the interest of the claimant was not forfeited." *Ibid.*

2. Petitioner is a federal prisoner serving a sentence of 20 years to life for committing first-degree murder in the District of Columbia. See *Ali* v. *United States*, 581 A.2d 368, 370 (D.C. 1990), cert. denied, 502 U.S. 893 (1991). In 2003, the Federal Bureau of Prisons (BOP) transferred petitioner from the United States Penitentiary in Atlanta to the United States Penitentiary in Inez, Kentucky.[1] Petitioner alleges that, during the transfer, BOP officials lost several items of his personal property, including a copy of the Koran, a prayer mat, three books of 37-cent stamps, and two packs of tube socks, valued at a total of $177. Petitioner further alleges that, when he picked up his property and attempted to inform BOP officials that some of his property was missing, they told him that he should file "a Federal tor[t] claim." J.A. 14-18, 24-27, 42-45.

Petitioner filed a timely administrative tort claim with the Southeast Regional Office of the BOP. J.A. 30-35; see 28 C.F.R. 543.30-543.32 (setting out procedures for filing an administrative claim with the BOP for "money damages for personal injury or death and/or damage to or loss of property"). The BOP denied the claim. J.A. 38-40. It concluded that petitioner "did not inform staff of any discrepancies or missing personal property" and "failed to provide documentation [that]

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[1] Petitioner has since been transferred to the United States Penitentiary in Terre Haute, Indiana, where he is currently incarcerated.

[he] had any of the alleged missing items in [his] possession prior to [his] transfer." J.A. 39.

3. Petitioner then filed suit in the United States District Court for the Northern District of Georgia against the United States, the BOP, and three BOP officials. Petitioner claimed, *inter alia*, that the United States was liable under the FTCA for the value of his lost property. J.A. 6-23, 47-48 & n.4.[2] The government moved to dismiss the FTCA claim for lack of subject matter jurisdiction, on the ground that the United States was immune from suit under the detention-of-property exception in 28 U.S.C. 2680(c).

The district court granted the government's motion to dismiss, holding that the detention-of-property exception in 28 U.S.C. 2680(c) was applicable. J.A. 41-56. The district court relied on the Eleventh Circuit's unpublished opinion in *Agunbiade* v. *Federal Bureau of Prisons*, 52 Fed. Appx. 492 (2002) (Table), which held that BOP officials constituted "law enforcement officer[s]" for purposes of the detention-of-property exception.

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[2] Petitioner also pursued claims against defendants under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, and claims against the individual defendants under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of his First, Fourth, and Fifth Amendment rights. See J.A. 6-23, 47-48 & n.4, 58. The district court dismissed those claims without prejudice for failure to exhaust administrative remedies under the applicable requirements of the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a). J.A. 51-55. The court of appeals vacated the dismissal of those claims, on the ground that it was unclear whether prison officials led petitioner to believe that his administrative tort claim would exhaust his non-FTCA claims. J.A. 60-62. On remand, the district court administratively closed the action pending this Court's decision. See 6/5/07 Order 2.

J.A. 50. The district court concluded that, while *Agunbiade* (as an unpublished opinion) was not binding, it constituted "persuasive authority." *Ibid.*

4. The court of appeals affirmed in relevant part. J.A. 57-62. At the outset, the court of appeals noted that this Court "has interpreted § 2680(c) broadly to cover not only damages arising from the detention of goods or merchandise, but also situations in which damages result from their negligent storage or handling." J.A. 59 (citing *Kosak* v. *United States*, 465 U.S. 848, 854-859 (1984)). The court then noted that it had previously addressed the meaning of the phrase "any other law enforcement officer" in *Schlaebitz* v. *United States Department of Justice*, 924 F.2d 193 (11th Cir. 1991) (per curiam). J.A. 59.

In *Schlaebitz*, an individual had sued the government after the U.S. Marshals Service confiscated his property when it arrested him for a parole violation, then released the property to a third party. 924 F.2d at 193-194. Citing decisions from other circuits, the Eleventh Circuit rejected the argument that the phrase "any other law enforcement officer[s]" referred only to "officials assisting * * * customs or tax collection." *Id.* at 194. The court instead held that Section 2680(c) "may include officers in other agencies performing their proper duties." *Ibid.* The court noted that "this interpretation comports well with * * * the purpose of the statute." *Id.* at 194-195.

Applying the reasoning of *Schlaebitz* in the BOP context, the court of appeals concluded in this case that "the district court did not err in finding that the officers who handled Ali's property fall within the exception found in 28 U.S.C. § 2680(c)." J.A. 60.

SUMMARY OF ARGUMENT

A. This case presents a straightforward question of statutory interpretation with a straightforward answer. As is relevant here, 28 U.S.C. 2680(c) preserves the federal government's immunity for "[a]ny claim arising in respect of * * * the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." The phrase "any other law enforcement officer" reaches "any * * * law enforcement officer" other than "an[] officer of customs or excise," and Section 2680(c) therefore exempts claims concerning the detention of property by all law enforcement officers. The "exception to the exception" that Congress subsequently added for claims concerning seizures for the purpose of civil forfeiture confirms that reading of Section 2680(c)'s plain text. Because Bureau of Prisons officials constitute "law enforcement officer[s]" under any conceivable understanding of that phrase, the lower courts correctly held that the government was immune from petitioner's suit challenging the alleged loss of his property.

B. Petitioner contends that, notwithstanding the plain language of Section 2680(c), the phrase "any other law enforcement officer" should be limited to those law enforcement officers who are "acting in a customs or tax capacity." The various canons of statutory construction that petitioner invokes, however, cannot support that profoundly atextual reading. At bottom, petitioner asserts that the Court should engraft his proposed limitation on the phrase "any other law enforcement officer" simply because other portions of the statute focus on customs and tax enforcement. This Court has long forsworn such an impressionistic approach to statutory

interpretation. In fact, petitioner's construction of Section 2680(c) not only cannot be squared with the scope of the exception to the exception, but would seemingly render the phrase "any other law enforcement officer" entirely, or almost entirely, superfluous, because petitioner fails to identify a single valid example of a law enforcement officer other than a customs or excise officer who could be said to be "acting in a customs or tax capacity."

C. Petitioner contends that Section 2680(c) should be given his more limited reading because the legislative history contains no affirmative indications that Congress intended to reach all law enforcement officers. Because the plain language of Section 2680(c) compels a broader construction, however, it is incumbent on *petitioner* to show that the legislative history cuts in the other direction. In fact, to the extent the legislative history sheds any light on Congress's intent in using the phrase "any other law enforcement officer," it actually supports the broader construction. While the legislative history is largely silent about the meaning of Section 2680(c), the official who apparently drafted the relevant language seemingly expressed the view that the statute reached all law enforcement officers, without regard to whether they were "acting in a customs or tax capacity." The legislative history certainly does not contain sufficient evidence about Congress's intent to trump the plain meaning of the text.

D. Finally, petitioner suggests that his reading of Section 2680(c) is consistent with the purposes behind the FTCA's exceptions. A reading of Section 2680(c) that reaches all law enforcement officers, however, not only is more consistent with the statute's plain language, but is equally consistent with Congress's underlying

policy objectives: most notably, its desire to protect important government activities from disruption by the threat of damages suits and to avoid exposing the government to liability for fraudulent claims. Should Congress wish to subject the government to liability for claims concerning the detention of property by law enforcement officers who are not "acting in a customs or tax capacity," it can always amend Section 2680(c) to do so. Such a limitation, however, cannot be discovered in the text of the statute as it is currently written.

ARGUMENT

BUREAU OF PRISONS OFFICIALS CONSTITUTE "LAW ENFORCEMENT OFFICERS" FOR PURPOSES OF THE DETENTION-OF-PROPERTY EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

In the Federal Tort Claims Act, which makes the United States liable for torts committed by federal employees under circumstances in which a private person would be liable, Congress included an exception for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C. 2680(c). Petitioner asserts that the phrase "any other law enforcement officer" is limited to law enforcement officers who are "acting in a customs or tax capacity." The plain language of Section 2680(c), however, belies that assertion, and petitioner's contention (Br. 17) that "Congress intended the phrase * * * to apply more narrowly than might appear from reading the phrase in isolation" lacks merit.

A. The Plain Language Of Section 2680(c) Makes Clear That Bureau Of Prisons Officials Constitute "Law Enforcement Officers" For Purposes Of The Detention-Of-Property Exception

1. As this Court has repeatedly noted, "in any case of statutory construction, our analysis begins with the language of the statute," and, "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks and citation omitted); see *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) (noting that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). That basic principle of statutory interpretation is equally applicable in construing the FTCA. The Court has explained that, where the "straightforward language" of an FTCA exception applies, judicially crafted limitations on the exception—whether rooted in policy concerns or intimations in the legislative history—have no place. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 701 (2004).

Section 2680(c) contains precisely such "straightforward language," and that language controls this case. As is relevant here, Section 2680(c) preserves the government's immunity for any claim concerning the "detention" of any property by "any officer of customs or excise or any other law enforcement officer." The phrase "any other law enforcement officer" thus reaches "any * * * law enforcement officer" *other than* an "officer of customs or excise." The language of Section 2680(c) "leaves no room to speculate about congressional intent," because, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*,

520 U.S. 1, 5, 9 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Accordingly, Section 2680(c) should be read to exempt claims concerning the detention of property by all law enforcement officers.[3]

"[W]hen the statute's language is plain, the sole function of the courts * * * is to enforce it according to its terms," unless "the disposition required by the text is * * * absurd." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks and citation omitted). Petitioner does not contend that construing Section 2680(c) to reach claims concerning the detention of property by all law enforcement officers would produce absurd results. Nor could he plausibly do so, because, far from being absurd, it is perfectly reasonable to immunize the federal government against such claims. See pp. 37-45, *infra*. Under first principles of statutory interpretation, therefore, Section 2680(c) should be read to mean what it says: *i.e.*, that claims concerning the detention of property by *any* law enforcement officer are exempt from the FTCA's waiver of sovereign immunity.

2. That reading of the detention-of-property exception in Section 2680(c) is confirmed by the "exception to the exception," which Congress added as part of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, § 3(a)(3), 114 Stat. 211, in order to waive the government's immunity for certain seizures of

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[3] Of course, the exemption in Section 2680(c) would only reach claims that are covered in the first place by the FTCA's waiver of sovereign immunity: *i.e.*, claims concerning the "act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b)(1).

property for the purpose of civil forfeiture.[4] The exception to the exception is applicable to "any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer," if, among other requirements, "the property was seized for the purpose of forfeiture under *any* provision of Federal law providing for the forfeiture of property" (except for criminal forfeiture). 28 U.S.C. 2680(c) (emphasis added).

In adding the exception to the exception, Congress clearly operated on the understanding that the phrase "any other law enforcement officer" in the original exception reached all other law enforcement officers.[5] If, as petitioner contends, Congress had believed that the

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[4] In CAFRA, Congress also extended the exception, which originally reached only the detention of "any goods or merchandise," 28 U.S.C. 2680(c) (1994), to reach the detention of "any goods, merchandise, or other property." § 3(a)(1), 114 Stat. 211. The exact significance of that amendment is not at issue here, because petitioner seemingly concedes (Br. 46-47 n.41) that the allegedly lost property in this case would constitute "goods or merchandise" as those terms were used in the original Section 2680(c). At a minimum, however, the amendment reflects Congress's desire to ensure that the exception in Section 2680(c) sweeps broadly.

[5] At the time Congress enacted CAFRA, the clear majority of the circuits to have addressed the issue had adopted that interpretation. See *Halverson* v. *United States*, 972 F.2d 654, 655-656 (5th Cir. 1992) (per curiam), cert. denied, 507 U.S. 925 (1993); *Schlaebitz*, 924 F.2d at 194-195; *Ysasi* v. *Rivkind*, 856 F.2d 1520, 1524-1525 (Fed. Cir. 1988); *United States* v. *2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1491 (10th Cir.), cert. denied, 469 U.S. 825 (1984); *United States* v. *Lockheed L-188 Aircraft*, 656 F.2d 390, 397 (9th Cir. 1979); but see *Kurinsky* v. *United States*, 33 F.3d 594, 598 (6th Cir. 1994) (adopting contrary interpretation), cert. denied, 514 U.S. 1082 (1995); *Bazuaye* v. *United States*, 83 F.3d 482, 486 (D.C. Cir. 1996) (same).

original exception reached only "officer[s] of customs or excise" (or other law enforcement officers "acting in a customs or tax capacity"), it would not have written such a broad exception to the exception, applicable whenever property was seized for the purpose of forfeiture under "any" civil forfeiture provision. Customs and internal revenue officers do not pursue forfeitures under the vast majority of civil forfeiture statutes, which involve contexts far removed from the performance of their respective duties. See, *e.g.*, 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* chs. 4-5 (June 2007) (discussing various civil forfeiture statutes). If Congress had shared petitioner's view of the exception, it presumably would have limited the exception to the exception to property seized pursuant to the forfeiture provisions relevant to customs and internal revenue functions (*i.e.*, the provisions in Titles 19 and 26 of the United States Code). See, *e.g.*, 19 U.S.C. 1595a (customs forfeiture); 26 U.S.C. 7301 (tax forfeiture). Congress did not so provide, and the logical conclusion is that Congress understood the phrase "any other law enforcement officer" to reach all other law enforcement officers.

The legislative history of CAFRA confirms that understanding. In the sole committee report on CAFRA, the House Judiciary Committee characterized the detention-of-property exception as "exempt[ing] [the government] from liability * * * for damage to property while detained by law enforcement officers." H.R. Rep. No. 192, 106th Cong., 1st Sess. 18 (1999). The Committee explained that the exception to the exception was intended to enable individuals to "make themselves whole after wrongful government seizures," *id.* at 11, and cited a prior example involving the detention of property by the Drug Enforcement Administration, *id.*

at 8-9. Moreover, Representative Hyde, the Judiciary Committee chairman, noted during the floor debates that, "[c]urrently, the Federal Government is exempt from liability for damage caused during the handling or storage of property being detained by law enforcement officers," and that the proposed amendment to Section 2680(c) would "allow[] property owners to sue the Federal Government for compensation for damage to their property when they prevail in civil forfeiture actions." 146 Cong. Rec. 5228 (2000).

Petitioner asserts (Br. 46, 47) that CAFRA's exception to the exception is "irrelevant to the case" because *his* property was not detained for the purpose of civil forfeiture. Petitioner thus contends (Br. 47) that, at least with regard to his claim, the detention-of-property exception should be construed "as * * * if CAFRA had never been enacted." That contention, however, ignores the settled principles of statutory interpretation that statutory language must be read with a view to its place in the overall statutory scheme, see, *e.g.*, *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *West Virginia Univ. Hosp., Inc.* v. *Casey*, 499 U.S. 83, 100-101 (1991); that statutory terms cannot have different meanings in different scenarios, see, *e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005); and that a subsequently enacted statute can shed light on the meaning of a previously enacted one, see, *e.g.*, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000); *United States* v. *Estate of Romani*, 523 U.S. 517, 530-531 (1998); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). Those principles pertain here, regardless whether the subsequently enacted statute directly

applies to petitioner's claim—and CAFRA confirms that the FTCA's detention-of-property exception was intended to reach *all* law enforcement officers, not merely those "acting in a customs or tax capacity."

Petitioner also contends that CAFRA's exception to the exception is irrelevant because "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Br. 48 (quoting *Jefferson County Pharm. Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 165 n.27 (1980)). That principle, however, is inapplicable where, as here, Congress's subsequent understanding of a previously enacted statute is actually embodied in a statute, not just in the legislative history of a subsequent enactment. See, *e.g.*, *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980); *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 843 (1988) (Kennedy, J., dissenting). All of the cases on which petitioner relies involve subsequent understandings that were embodied only in legislative history.[6] Here, CAFRA itself confirms that the FTCA's detention-of-property exception was intended to reach *any* law enforcement officer—as the plain language of that exception itself makes clear.

3. If Section 2680(c) is construed, consistent with its plain language, to encompass claims concerning the detention of property by any law enforcement officer, it is indisputable, as petitioner seemingly concedes (Br. 20 n.14), that the Bureau of Prisons officials who were responsible for the alleged detention of his property con-

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[6] See *Jefferson County Pharm. Ass'n*, 460 U.S. at 165 n.27; *GTE Sylvania*, 447 U.S. at 118 n.13; *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979); *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977); *United Air Lines, Inc.* v. *McCann*, 434 U.S. 192, 200 & n.7 (1977); *United States* v. *Price*, 361 U.S. 304, 313 (1960).

stitute "law enforcement officer[s]." Although Section 2680(c) does not define the phrase "law enforcement officer," BOP officials "enforce[]" the "law" under any conceivable understanding of that phrase; in addition to administering the federal prison system, BOP officials have broad authority to make arrests. See 18 U.S.C. 3050. Moreover, BOP officials unambiguously qualify as "law enforcement officers" under a variety of statutes that do expressly define that phrase (or similar ones)—most notably, 28 U.S.C. 2680(h), the provision of the FTCA that waives the government's immunity for claims arising out of intentional torts that involve the acts or omissions of "investigative or law enforcement officers." See also 5 U.S.C. 8331(20) (civil service retirement benefits); 18 U.S.C. 3592(c)(14)(D) (aggravating factor for purposes of federal death penalty); 42 U.S.C. 3796b(6) (death benefits); see generally *Chapa* v. *United States Dep't of Justice*, 339 F.3d 388, 390 (5th Cir. 2003) (per curiam) (citing other statutes). Because Section 2680(c) encompasses claims concerning the detention of property by all law enforcement officers, and because BOP officials plainly constitute "law enforcement officers" under any definition of that phrase, the lower courts correctly held that the government is immune from suit under the detention-of-property exception.[7]

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[7] Although petitioner does not contend here (and did not contend below) that his claim does not arise in respect of the "detention" of property, petitioner nevertheless suggests (Br. 10 n.9) that the meaning of the term "detention" "remains open to debate." At a minimum, however, it is clear that the term "detention" encompasses short-term custody of property of the type at issue here. See, *e.g.*, *Chapa* v. *United States Dep't of Justice*, 339 F.3d 388, 390-391 (5th Cir. 2003) (per curiam) (holding that BOP officials "detained" prisoner's property when they inspected and then shipped it during an inter-prison transfer). The term "detention" is also properly construed to encompass longer-

B. Nothing In The Text Of Section 2680(c) Supports The Conclusion That The Phrase "Any Other Law Enforcement Officer" Refers Only To Law Enforcement Officers Who Are "Acting In A Customs Or Tax Capacity"

1. Petitioner contends that, notwithstanding the plain language of Section 2680(c), the phrase "any other law enforcement officer" should be limited to those law enforcement officers who are "acting in a customs or tax capacity." The simplest response to that contention is that, if Congress had intended to impose such a narrow limitation, it would have written a different statute. Indeed, in one of the federal officer removal statutes in effect at the time of the FTCA's enactment, Congress had provided for removal not only by any internal revenue officer, but also by "any person acting under or by authority of any such officer on account of any act done under color of his office." Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171. Congress, however, chose not to employ similar language in Section 2680(c), but instead used the expansive phrase "any other law enforcement officer." This Court has repeatedly declined to give limiting constructions to broad statutory language where "Congress did not add any language limiting the [statute's] breadth." *Gonzales*, 520 U.S. at 5 (refusing to construe "any * * * term of imprisonment" to mean

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term *seizures* of property. See Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 16 (1931) (*Holtzoff Report*) (explaining that the detention-of-property exception "has specific reference to the detention of imported goods in appraisers' warehouses or customs houses, as well as *seizures* by law enforcement officials, internal revenue officers, and the like") (emphasis added). Were it otherwise, the subsequently added exception to the exception in Section 2680(c) for claims involving property that "was seized for the purpose of forfeiture," see pp. 10-14, *supra*, would make little sense.

any *federal* term of imprisonment); see *Maine* v. *Thiboutot*, 448 U.S. 1, 4, 6 (1980) (refusing to read the term "laws" in 42 U.S.C. 1983 to be limited to "civil rights or equal protection laws," on the ground that "Congress attached no modifiers to the phrase"). Congress's failure to use limiting language here strongly suggests that Congress did not intend to adopt the limitation that petitioner proposes.

2. Petitioner contends (Br. 12-18) that various canons of statutory construction—*viz.*, the canon of *ejusdem generis*, the canon of *noscitur a sociis*, and the rule against superfluities—support his proposed reading of Section 2680(c). Those canons, however, are merely "aid[s] to the ascertainment of the true meaning of the statute," *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 89 (1934), not devices to cloud the meaning of clear statutory text. In any event, none of those canons supports petitioner's strained reading.

a. Petitioner first relies (Br. 13-15) on the canon of *ejusdem generis* (or "of the same kind"), which stands for the proposition that, "when a general phrase follows a list of specifics, it should be read to include only things of the same type as those specifically enumerated." *James* v. *United States*, 127 S. Ct. 1586, 1592 (2007). As a preliminary matter, that canon is inapplicable where, as here, the general (or residual) phrase at issue has a clear meaning. See, *e.g.*, *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 127-129 (1991); *United States* v. *Turkette*, 452 U.S. 576, 581 (1981); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588 (1980); see also *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 138 n.2 (2001) (Souter, J., dissenting) (citing additional cases). That is particularly true when the general

phrase at issue is introduced with the expansive term "any." See pp. 9-10, *supra*.

At a minimum, where the general phrase can be given a reasonable meaning without applying a limiting construction, the force of the *ejusdem generis* canon is accordingly weaker. To take petitioner's example (Br. 13), if a statute were to refer to "tacks, staples, screws, nails, rivets, and other things," it would be nonsensical for the phrase "other things" to be read to refer to any other object whatsoever (as opposed to, say, any other fastener, or any other metal fastener)—and resort to the *ejusdem generis* canon is therefore obviously necessary. If the residual phrase at issue were instead "any other hardware," however, that phrase could not be limited to hardware used for fastening. But that is the burden of petitioner's argument. The residual phrase in the statute at issue here is not some phrase in obvious need of limitation, such as "other persons" (or even "other government officials"), but rather the more limited phrase "any other law enforcement officer." The *ejusdem generis* canon cannot be used to limit that phrase still further—*i.e.*, to a subset of law enforcement officers—without reading the word "any" out of the statute.

The *ejusdem generis* canon is inapplicable here for the further reason that, as petitioner seemingly acknowledges (Br. 13), it is triggered only when a general phrase follows a *list* of specific phrases. See, *e.g.*, *James*, 127 S. Ct. at 1592; *United States* v. *Aguilar*, 515 U.S. 593, 615 (1995) (Scalia, J., concurring in part and dissenting in part); *Holder* v. *Hall*, 512 U.S. 874, 918 (1994) (Thomas, J., concurring in the judgment); see also 2A Norman J. Singer, *Sutherland on Statutory Construction* § 47:17, at 273-274 (6th ed. 2000) (Singer). In this case, the only specific phrase that is parallel to

the residual phrase "any other law enforcement officer" is the single phrase "any officer of customs or excise."[8] This Court, applying the related canon of *noscitur a sociis*, has previously rejected the argument that "pairing a broad statutory term with a narrow one shrinks the broad one," on the ground that "giving one example does not convert express inclusion into restrictive equation, and *noscitur a sociis* is no help absent some sort of gathering with a common feature to extrapolate." *S.D. Warren & Co.* v. *Maine Bd. of Envt'l Prot.*, 126 S. Ct. 1843, 1849 (2006); cf. *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 587 (1995) (Thomas, J., dissenting) (explaining that "[t]o read one word in a long list as controlling the meaning of all the other words would defy common

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[8] Petitioner seemingly construes the phrase "any officer of customs or excise" to reach all customs and *tax* officers. See, *e.g.*, Br. 10, 12, 13, 17, 18. The exact meaning of that phrase, however, is unclear. While the concept of a "customs officer" is a familiar one (and the phrase is used throughout the United States Code, see, *e.g.*, 19 U.S.C. 1401(i), 1589a), the phrase "excise officer" (or "officer of excise") appears nowhere else. In drafting the language that would become Section 2680(c), Special Assistant to the Attorney General Alexander Holtzoff appears to have borrowed the phrase "any officer of customs or excise" from a British bill that would have immunized the British government from claims concerning the detention of property by "any officer of customs *and* excise acting as such." Crown Proceedings Committee, Report, 1927, Cmd. 2842, § 11(5)(c), at 17-18 (U.K.) (emphasis added); see p. 34, *infra*. At the time (and until 2005), in the United Kingdom, a single Customs and Excise Department had responsibility for collecting both customs duties and excise taxes, whereas the Inland Revenue Department had responsibility for collecting income tax. See H.M. Revenue & Customs, *About Us* (visited Sept. 24, 2007) <www.hmrc.gov.uk/menus/aboutmenu.htm>. In the United States, by contrast, internal revenue officers have long had responsibility not only for excise taxes, but also for various other federal taxes (including income tax). See 26 U.S.C. 7608 (2000 & Supp. IV 2004).

sense; doing so would prevent Congress from giving effect to expansive words in a list whenever they are combined with one word with a more restricted meaning"). The only case cited by petitioner in which this Court applied the *ejusdem generis* canon is readily distinguishable on that basis. See *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 382-385 (2003) (construing 42 U.S.C. 407(a), which precluded recovery of benefits through "execution, levy, attachment, garnishment, or other legal process").

Finally, even assuming it were otherwise applicable, the *ejusdem generis* canon would still not support petitioner's proffered construction of "any other law enforcement officer." That is because petitioner's construction is too narrow. See *James*, 127 S. Ct. at 1592 (rejecting proposed common attribute of items in a list in favor of a "mo[re] relevant" one). All else being equal, if a statute were to refer to "spoons, forks, and any other utensil," it would be unnatural for the phrase "any other utensil" to be read to refer only to all other utensils used in the capacity of spoons or forks, rather than all other kitchen utensils (such as knives). To the extent that the specific phrases are distinct yet share a relevant common attribute, it is simply that customs and excise officers are *law enforcement officers*—a common attribute that merely serves to confirm the plain meaning of the residual phrase "any other law enforcement officer."

b. Petitioner next invokes (Br. 15-17) the related (but discrete) canon of *noscitur a sociis* (or "it is known by its companions"), which stands for the proposition that "the meaning of an unclear word or phrase should be determined by the words immediately surrounding

it." *Black's Law Dictionary* 1084 (7th ed. 1999). That canon, however, is applicable only where the relevant statutory term or phrase is ambiguous. See, *e.g.*, *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 520 (1923) (noting that "*[n]oscitur a sociis* is a well-established and useful rule of construction, where words are of obscure or doubtful meaning, and *then, but only then*, its aid may be sought to remove the obscurity or doubt by reference to the associated words") (emphasis added); *James*, 127 S. Ct. at 1605 (Scalia, J., dissenting) (explaining, in defining the *noscitur a sociis* canon, that "which of various possible meanings a word should be given must be determined in a manner that makes it 'fit' with the words with which it is closely associated"); see also 2A Singer § 47:15, at 265. To take petitioner's example (Br. 16), because the word "bay" has two well-established meanings, it would plainly mean one thing in the sentence, "I took the boat out on the bay," and quite another in the sentence, "I put the saddle on the bay."

Because the phrase "any other law enforcement officer" is broad but not ambiguous, the *noscitur a sociis* canon has no application. Cf. *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (noting that, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity[;] [i]t demonstrates breadth") (internal quotation marks and citation omitted); accord *United States* v. *Monsanto*, 491 U.S. 600, 609 (1989) (characterizing statutory reference in forfeiture statute to "any property" as "comprehensive," "broad," and "unambiguous"). Petitioner's effort to use the *noscitur a sociis* canon dramatically to narrow the scope of the statute simply cannot be squared with the expansive term "any." See pp. 9-10, *supra*. Petitioner seeks to use the canon here to

invert the phrase "any other law enforcement officer" to mean almost *no* other law enforcement officer. But that is a weight that the canon cannot bear.

Even assuming, moreover, that the phrase "any other law enforcement officer" were ambiguous—a contention that petitioner conspicuously fails to make—the *noscitur a sociis* canon would have little, if any, force, because there is only a weak contextual basis to justify limiting the phrase in the drastic manner petitioner proposes: *i.e.*, to law enforcement officers "acting in a customs or tax capacity." Petitioner relies (Br. 17) not only on the preceding phrase "any other officer of customs or excise" in the second part of Section 2680(c), but also on the first part of Section 2680(c), which preserves the government's immunity for the discrete category of claims concerning "the assessment or collection of any tax or customs duty." Putting aside petitioner's reliance on related text that is no more implicated in this case than the exception to the exception that petitioner dismisses as irrelevant, the mere fact that the preceding portion of the statute "dwell[s] exclusively on customs and taxes," *ibid.* (citation omitted), is insufficient to justify imposing an otherwise unnatural limitation on the phrase "any other law enforcement officer" in the distinct detention-of-property portion of the statute. Indeed, the contrast between the two reinforces the conclusion that Congress meant what it said when, in facially expansive language, it made the detention-of-property exception applicable not only to "any officer of customs or excise," but also to "any other law enforcement officer."

This case thus is a far cry from the cases on which petitioner relies, in which the contextual cues were considerably stronger (and the text being interpreted was more ambiguous). For instance, in *Gutierrez* v. *Ada*, 528

U.S. 250 (2000), the Court construed the phrase "any election" in the Guam Organic Act, 48 U.S.C. 1422, to refer only to gubernatorial elections, but it did so based on the fact that the relevant phrase was "preceded by two references to gubernatorial election and followed by four." 528 U.S. at 254-255. Understandably, on that basis, the Court unanimously agreed that such a reading of the phrase "any election" was "obvious." *Id.* at 257. It would constitute a muscular (and indeed, virtually unprecedented) application of the *noscitur a sociis* canon to read a limitation into plain language in one portion of a statute based not on such strong contextual cues, but rather solely on the generic assertion that another portion of the statute focuses on a particular subject.[9]

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[9] In the wake of Congress's enactment of the FTCA, numerous States passed tort-claims statutes of their own. Many of those statutes included provisions strikingly similar to Section 2680(c), but for the understandable omission of any reference to customs officers or duties. It is clear that, under those provisions, the phrase "any law enforcement officer" refers to all law enforcement officers—not simply to law enforcement officers "acting in a tax context." See, *e.g.*, Ga. Code Ann. § 50-21-24(3) (2006) (exception for any claim resulting from "[t]he assessment or collection of any tax or the detention of any goods or merchandise by any law enforcement officer"); Haw. Rev. Stat. Ann. § 662-15(2) (Supp. 2006) (exception for "[a]ny claim arising in respect of the assessment or collection of any tax, or the detention of any goods or merchandise by law enforcement officers"); Iowa Code § 669.14(2) (Supp. 2007) (exception for "[a]ny claim arising in respect to the assessment or collection of any tax or fee, or the detention of any goods or merchandise by any law enforcement officer"); Mass. Ann. Laws ch. 258, § 10(d) (LexisNexis 2004) (exception for "any claim arising in respect of the assessment or collection of any tax, or the lawful detention of any goods or merchandise by any law enforcement officer"); Neb. Rev. Stat. Ann. § 13-910(5) (LexisNexis Supp. 2006) (exception for "[a]ny claim arising with respect to the assessment or collection of any

c. Petitioner also contends (Br. 17-18) that a construction of the detention-of-property exception to reach all law enforcement officers would violate the rule against superfluities, which provides that "a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). Such a construction, however, would not render the phrase "any officer of customs or excise" superfluous. Customs or excise officers would be covered by that phrase, not the successive (and mutually exclusive) phrase "any other law enforcement officer"—just as they would under petitioner's construction.

In fact, it is *petitioner's* construction of Section 2680(c) that would seemingly render the phrase "*any other law enforcement officer*" entirely, or almost entirely, superfluous. While petitioner contends that the phrase should be limited to law enforcement officers (other than customs or excise officers) who are "acting in a customs or tax capacity," it is far from clear when such law enforcement officers would fall into that category, if at all. The only actual example petitioner cites from the sixty-year history of the FTCA is a case in which agents of the Drug Enforcement Administration (DEA) seized and searched an automobile that had been shipped from abroad (and was apparently in domestic transit). See Br. 18 & n.12 (citing *Formula One Motors, Ltd.* v. *United States*, 777 F.2d 822 (2d Cir. 1985)). In that case, however, it is doubtful that the DEA agents could be said to have been "acting in a customs or tax capacity"; instead, when the agents seized the automo-

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tax or fee or the detention of any goods or merchandise by any law enforcement officer").

bile (pursuant to a search warrant) and searched it for narcotics, they were presumably acting in their ordinary drug-enforcement capacity. See, *e.g.*, 21 U.S.C. 878 (establishing authority of DEA agents, including authority to execute search warrants); 21 U.S.C. 881(a)(4) and (b) (providing for seizure and forfeiture of "[a]ll * * * vehicles * * * which are used, or are intended for use, to transport" controlled substances); cf. *Formula One Motors*, 777 F.2d at 824 (stating, without elaboration, that the DEA agents were carrying out functions "*akin to* the functions carried out by Customs officials") (emphasis added).[10] Petitioner provides no other examples—either real or hypothetical—of cases that his cramped interpretation of the phrase "any other law enforcement officer" would reach.

In a related vein, petitioner contends (Br. 18) that, "[i]f Congress had actually intended th[e] phrase ['any other law enforcement officer'] to include any law enforcement officer regardless of capacity, the provision

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[10] Similarly, when customs officers enforce the drug laws, they could be said to be acting in a drug-enforcement, not a customs, capacity. See 19 U.S.C. 482 (Supp. V 2005); 21 U.S.C. 952; *Taylor* v. *United States*, 550 F.2d 983, 988 (4th Cir. 1977) (stating that, when a customs officer seized drugs at the border, he was "acting to enforce the drug law's prohibition against importation, not to enforce an independent rule of the customs law"). If so, it is unclear whether detentions of property by such officers would be covered under petitioner's reading of Section 2680(c)—even though Section 2680(c) expressly refers to the detention of goods by "any officer of customs," without any limitation on the capacity in which such an officer is acting. Detentions of property by such officers would unquestionably be covered, by contrast, under the government's reading.

could have simply read 'detention * * * by any law enforcement officer' and meant precisely the same thing." But the fact that Congress might have addressed a topic more concisely does not license rewriting of the statute. Petitioner's contention, moreover, ignores the common practice in legislative (or other) drafting of including specific illustrations in a provision for clarity or emphasis.

Indeed, as this Court has noted, whenever Congress drafts a statute with one or more specific items followed by a general residual phrase, it could omit the specific items and include only a broader version of the general phrase. See *Harrison*, 446 U.S. at 589 n.6.[11] Thus, if Congress passed a statute that referred to "spoons, forks, or any other utensil," it could instead have referred simply to "any utensil." The same could be said, moreover, even if the residual phrase at issue is written in general terms but narrowed through the canon of *ejusdem generis*. Thus, if Congress passed a statute that referred to "spoons, forks, or any other utensil" and the statute were construed to refer to "spoons, forks, or any other kitchen utensil," Congress could instead have referred simply to "any kitchen utensil."

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[11] The United States Code—and indeed the Constitution—are replete with similar provisions. See, *e.g.*, U.S. Const. Art. IV, § 2, Cl. 2 (providing for extradition of persons "charged in any State with Treason, Felony, or other Crime"); 18 U.S.C. 758 (imposing criminal sanctions for "flee[ing] or evad[ing] a checkpoint operated by the Immigration and Naturalization Service, or any other Federal law enforcement agency"); 18 U.S.C. 2113(a) (imposing criminal sanctions for taking from a bank "any property or money or any other thing of value"); 20 U.S.C. 1652(b) (prohibiting any "officer, agent, or employee of the Department of Education, the Department of Justice, or any other Federal agency" from requiring local education agencies to use funds for busing).

Applying that logic to this case, even under petitioner's construction of the detention-of-property exception, Congress could readily have rewritten the statute to say the same thing: rather than referring to "any officer of customs or excise or any other law enforcement officer [acting in a customs or tax capacity]," Congress could instead have referred simply to "any law enforcement officer acting in a customs or tax capacity."

Moreover, while Congress could have given Section 2680(c) the same meaning simply by referring to "any law enforcement officer," its decision not to do so, and instead to break out the specific reference to "any officer of customs or excise," is readily understandable in light of the provision's history. As discussed below, see p. 31, Section 2680(c), as initially drafted, consisted only of the portion preserving the government's immunity for claims concerning "the assessment or collection of any tax or customs duty." The detention-of-property portion was subsequently proposed to be added to that provision, almost certainly by Special Assistant to the Attorney General Alexander Holtzoff, and eventually enacted without alteration (or discussion). Although Judge Holtzoff's exact thought processes in drafting the detention-of-property exception remain unknown, he may have broken out the phrase "any officer of customs or excise" from the phrase "any other law enforcement officer" to emphasize that customs or excise officers would be covered (or to eliminate any doubt on that score). See, *e.g.*, *Fort Stewart Sch.* v. *FLRA*, 495 U.S. 641, 646 (1990); *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 44 n.5 (1983); *Circuit City Stores*, 532 U.S. at 140 (Souter, J., dissenting). Alternatively, Judge Holtzoff may have initially drafted the detention-of-property exception to reach only customs or excise officers (thus

picking up, if somewhat imprecisely, on the general subject of the prior portion of the provision, as well as the language of the British bill on which the exception was based), then extended the exception to reach other law enforcement officers on the ground that the justifications for exempting claims concerning the detention of property by customs or excise officers apply to the detention of property by other law enforcement officers as well. See pp. 31-34, *infra*; cf. CAFRA § 3(a)(1), 114 Stat. 211 (extending exception from the detention of "any goods or merchandise" to the detention of "any goods, merchandise, or other property"). But regardless whether Congress's ultimate use of the specific phrase "any officer of customs or excise" can be traced to a desire for emphasis, an abundance of caution, or merely the evolution of the statute, there is ample explanation for its inclusion—and the mere *fact* of its inclusion certainly does not counsel in favor of a more limited reading of the phrase "any other law enforcement officer."

Finally, petitioner contends (Br. 23) that the rule against superfluities requires that the definition of "law enforcement officer" in Section 2680(h), the FTCA's intentional-tort exception, not be applied to Section 2680(c)—and goes so far as to suggest (Br. 23 n.18) that the fact that Congress defined that phrase in Section 2680(h) affirmatively suggests that Congress intended a narrower meaning for "law enforcement officer" in Section 2680(c). No such inference can be drawn, however, from Section 2680(h). That subsection defines a slightly different phrase—"investigative or law enforcement officers"—and expressly does so only for purposes of that subsection (which waives the government's immunity for claims arising out of intentional torts that involve the acts or omissions of "investigative or law

enforcement officers"). Moreover, the purpose of the definition of that phrase in Section 2680(h) may well have been to impose *limits* on how broadly the phrase (and the resulting waiver of sovereign immunity) would be interpreted—especially given its reference to "investigative" officers—not (as petitioner seemingly assumes, see Br. 22 n.16) to ensure that the phrase would be interpreted more *expansively* than its plain language would otherwise require.[12] To the extent that Section 2680(h) is relevant, therefore, it is because its definition is consistent with the plain meaning of the phrase "law enforcement officer." See pp. 14-15, *supra* (discussing definitions from Section 2680(h) and other statutes). Because petitioner offers no valid textual basis for deviating from that plain meaning, the Court should adopt it here.[13]

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[12] As petitioner also notes (Br. 24), the portion of Section 2680(h) containing that definition was added in 1974—after the original enactment of the FTCA. See Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50.

[13] Petitioner also relies (Br. 47-48 n.42) on Congress's failure to pass the Forfeiture Act of 1997 (a predecessor to CAFRA), which not only would have created an exception to Section 2680(c)'s exception for civil forfeiture (like CAFRA), but also would have incorporated the definition of "investigative or law enforcement officer" from Section 2680(h) into Section 2680(c). H.R. 1745, 105th Cong., 1st Sess. § 106 (1997). Petitioner's preference for interpreting the scope of Section 2680(c) based on a failed predecessor to CAFRA, while seeking to ignore the strong cues provided by CAFRA's duly enacted text, inverts this Court's usual approach. The Court has repeatedly warned that "[c]ongressional inaction lacks persuasive significance," on the ground that "several equally tenable inferences may be drawn from such inaction." *E.g.*, *PBGC* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks and citation omitted). There are particularly good reasons not to attach any significance to Congress's inaction with regard to the Forfeiture Act. Congress may simply have been dissatisfied with other

C. The Legislative History Of Section 2680(c) Likewise Does Not Support The Conclusion That The Phrase "Any Other Law Enforcement Officer" Refers Only To Law Enforcement Officers Who Are "Acting In A Customs Or Tax Capacity"

Petitioner contends (Br. 25) that the legislative history of Section 2680(c) "confirms that Congress intended the exception to exclude claims arising from detentions of property by only officers engaged in customs and tax activities." As a preliminary matter, there is no need to resort to legislative history where, as here, the relevant statutory text is unambiguous. See, *e.g.*, *Circuit City Stores*, 532 U.S. at 119; *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994); *Connecticut Nat'l Bank*, 503 U.S. at 254. As this Court has recognized in construing a different aspect of Section 2680(c), moreover, the legislative history of that provision is "meager." *Kosak*,

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provisions of that bill. And to the extent that Congress focused on the provision that would have amended Section 2680(c), Congress may have been uncomfortable with the scope of the bill's exception to the exception for civil forfeitures, which was considerably broader than the one ultimately enacted three years later in CAFRA. Finally, Congress may have thought it unnecessary to provide an express definition of "law enforcement officer" in Section 2680(c), in light of the fact that the clear majority of the circuits to have addressed the issue had held, consistent with the phrase's plain meaning, that it reached *all* law enforcement officers. See p. 11 n.5, *supra*. The mere fact that the Sixth Circuit had held to the contrary hardly suggests that Congress ratified its construction by failing to enact the Forfeiture Act—and the case on which petitioner relies for that proposition is wholly inapposite. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (finding significant "a refusal by Congress to overrule *an agency's* construction of legislation * * * where the *administrative* construction has been brought to Congress's attention through legislation specifically designed to supplant it") (emphases added).

465 U.S. at 855. To the extent the legislative history of Section 2680(c) sheds any light on Congress's intent in using the phrase "any other law enforcement officer," however, it supports the government's construction of that phrase, not petitioner's.

1. As petitioner correctly notes (Br. 25-26), in the twenty years before the FTCA's eventual enactment in 1946, Congress considered various bills that would have waived the government's sovereign immunity for tort claims. Early versions of those bills contained a precursor to Section 2680(c) that preserved the government's immunity for claims concerning "the assessment or collection of any tax or customs duty," but made no provision for claims concerning the detention of property. See, *e.g.*, H.R. 17168, 71st Cong., 3d Sess. § 3(a)(2) (1931); H.R. 15428, 71st Cong., 3d Sess. § 4(a)(2) (1930); S. 4377, 71st Cong., 2d Sess. § 4(a)(2) (1930). The exception for claims concerning "the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer" first appeared in bills introduced in December 1931, see H.R. 5065, 72d Cong., 1st Sess. § 206(2); S. 211, 72d Cong., 1st Sess. § 206(2), and reappeared verbatim in various bills leading up to the FTCA's enactment in 1946. The language of the House bill in which the exception first appeared was prepared by the General Accounting Office and the Department of Justice. See *General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims*, 72d Cong., 1st Sess. 7 (1932) (*1932 Hearing*) (statement of Rep. Collins).

2. The language of the detention-of-property exception, like other language in the House bill, was almost certainly initially drafted by Special Assistant to the Attorney General Alexander Holtzoff. See *Kosak*, 465

U.S. at 855-856. In a report accompanying his own draft bill, which contained the detention-of-property exception, Judge Holtzoff provided an explanation for the addition of that language.[14] At the outset, he observed that the exception for claims concerning the assessment or collection of any tax or customs duty "appears in all previous drafts." Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 16 (1931). He then stated that the provision had been expanded so as to reach claims concerning "the detention of goods or merchandise by any officer of customs or excise"—thus tracking the language in the first part of the detention-of-property exception. *Ibid.* In the critical next sentence of his report, Judge Holtzoff noted that the detention-of-property exception "has special reference to the detention of imported goods in appraisers' warehouses or customs houses, as well as seizures by *law enforcement officials*, internal revenue officers, and the like." *Ibid.* (emphasis added).

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[14] Judge Holtzoff's report was submitted to Assistant Attorney General Charles B. Rugg, who in turn transmitted it to counsel for the Comptroller General in the General Accounting Office. See Letter from Charles B. Rugg to O.R. Maguire (Oct. 19, 1931). In *Kosak*, this Court considered Judge Holtzoff's report on the ground that it would be "senseless to ignore entirely the views of [Section 2680(c)'s] draftsman." 465 U.S. at 857 n.13. At the same time, however, the Court acknowledged that, "because the report was never introduced into the public record, the ideas expressed therein should not be given great weight in determining the intent of the Legislature." *Ibid.* In his dissenting opinion in *Kosak*, Justice Stevens noted that "[t]here is no indication that any Congressman ever heard of [Judge Holtzoff's report] or knew that it even existed," *id.* at 863, and concluded that "[t]he intent of a lobbyist—no matter how public spirited he may have been—should not be attributed to the Congress without positive evidence that elected legislators were aware of and shared the lobbyist's intent," *ibid.*

By referring to "law enforcement officials" without qualification, Judge Holtzoff seemingly expressed the view that all law enforcement officers would be covered by the detention-of-property exception, regardless whether they were "acting in a customs or tax capacity." In contending otherwise, petitioner attempts to apply the same canons of construction to Judge Holtzoff's explanatory language that he wields against the statutory text. See Br. 29 (contending that "[Judge Holtzoff's] reference to 'other [*sic*] law enforcement officers, internal revenue officers, and the like' * * * is best understood as his way of explaining that the exception turned on the acts in which [those individuals] might be engaged—specifically, the detention of property while enforcing customs and tax laws"). When read in context, however, there is even less reason to limit Judge Holtzoff's use of the phrase "law enforcement officials" than Congress's use of the phrase "law enforcement officer" in the FTCA itself. Unsurprisingly, therefore, even one of the courts of appeals that ultimately adopted petitioner's reading of Section 2680(c) abjured any reliance on Judge Holtzoff's report. See *Bazuaye* v. *United States*, 83 F.3d 482, 484 (D.C. Cir. 1996) (explaining that "[a]ny attempt to parse this report suffers from the same interpretative problem plaguing § 2680(c) itself"). At a minimum, the relevant language in Judge Holtzoff's report does not support the proposition that the phrase "any other law enforcement officer" should be limited to law enforcement officers "acting in a customs or tax capacity"; to the contrary, it affirmatively undermines that proposition. See *Ysasi* v. *Rivkind*, 856 F.2d 1520, 1524 (Fed. Cir. 1988) (concluding that "the government's

broad reading of [Section 2680(c)] comports with [Judge Holtzoff's] report").[15]

Petitioner also relies (Br. 29-30) on the next sentence in the report, in which Judge Holtzoff explained that the inspiration for the detention-of-property exception was "[a] proposed draft of the bill submitted by the Crown Proceedings Committee in England in 1927." That sentence, however, sheds no light on the meaning of the residual phrase "any other law enforcement officer," because the British bill, unlike Judge Holtzoff's draft bill, did not contain such a residual phrase. See Crown Proceedings Committee, Report, 1927, Cmd. 2842, § 11(5)(c), at 17-18 (U.K.) (immunizing the British government from claims concerning the detention of property by "any officer of customs and excise acting as such"). Judge Holtzoff apparently added the phrase "any other law enforcement officer" himself—and it is reasonable to conclude that he did so in the belief that the justifications for exempting claims concerning the detention of property by customs or excise officers (as the British bill did) applied equally to the detention of property by other law enforcement officers. See pp. 37-45, *infra*.

3. Petitioner also cites (Br. 31-32) various other items from the legislative history of unenacted tort-

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[15] Notably, elsewhere in his report, Judge Holtzoff noted that the New York Attorney General had informed him that, under that State's tort statute, "claims for damages by prison inmates ha[d] been on the increase." *Holtzoff Report* 14. Judge Holtzoff then explained that "[t]his source of liability [was] expressly eliminated by the proposed [federal] bill." *Ibid.* Insofar as prisoner claims for property damage are concerned, the basis for preserving the federal government's immunity against such claims would presumably be the detention-of-property exception that Judge Holtzoff apparently added to Section 2680(c).

claims bills containing the detention-of-property exception. As this Court has noted, however, the provision that would become Section 2680(c), like many of the other proposed statutory exceptions, was never the subject of congressional debate, and there is therefore no "direct evidence regarding how Members of Congress understood" that provision. *Kosak*, 465 U.S. at 857 n.13.

The only authorities cited by petitioner (Br. 31 n.26) that so much as mention the provision that would become Section 2680(c) are committee reports and other materials that summarize—often in a single sentence—*all* of the proposed exceptions. It is true that, in describing the provision that would become Section 2680(c), those summaries do not advert to the phrase "any other law enforcement officer"—and, indeed, sometimes do not mention the detention-of-property exception (or various other exceptions) at all. See, *e.g.*, S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942) (referring to "claims arising out of * * * the assessment or collection of taxes or assessments [or] the detention of goods by customs officers");[16] H.R. Rep. No. 2428, 76th Cong., 3d Sess. 5 (1940) (referring only to "claims arising in connection with * * * the collection of taxes"). As petitioner seemingly acknowledges (Br. 31), however, those summaries provide no affirmative support for the proposition that Congress intended the phrase "any other law enforcement officer" to include only law enforcement officers "acting in a customs or tax capacity."

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[16] The summary in the 1942 Senate report was repeated verbatim in a series of subsequent reports. See H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1946); S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946); Staff of the Joint Comm. on the Organization of Congress, 79th Cong., 2d Sess., *Legislative Reorganization Act of 1946*, at 38 (Comm. Print 1946).

To the extent those summaries even refer to the detention-of-property exception, they at most suggest that Congress was particularly concerned with claims concerning the detention of property by customs officers—not that Congress did not intend to reach claims concerning the detention of property by all other law enforcement officers. Cf. *Kosak*, 465 U.S. at 865 (Stevens, J., dissenting) (explaining that, in those summaries, "precision of meaning [was] naturally and knowingly sacrificed in the interest of brevity"). As this Court has noted, "mere silence in the legislative history" cannot overcome "the clarity of the text." *Whitfield* v. *United States*, 543 U.S. 209, 216 (2005); see *Harrison*, 446 U.S. at 592 (noting that "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute").

Petitioner also notes (Br. 31-32) that, in testifying before Congress about the provision that would become Section 2680(c), Assistant Attorney General Francis M. Shea characterized that provision as applying to "claims arising out of * * * the assessment or collection of taxes or duties * * * [and] the detention of goods by customs officers." *Tort Claims: Hearing on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 28, 33 (1942). Like the congressional summaries discussed above, however, Assistant Attorney General Shea's summary is silent about, and carries no negative implication regarding, the meaning of the phrase "any other law enforcement officer." Indeed, an explanatory memorandum concerning the then-pending version of the bill (which was apparently supplied by Assistant Attorney General Shea at the same hearing, see *id.* at 7) contained a more detailed

summary making clear that the provision reached "claims arising out of * * * the assessment or collection of taxes or customs [and] the detention of goods by a customs, excise, *or law-enforcement officer*." *Id.* at 45 (emphasis added). There is therefore no reason to believe that anyone in the Department of Justice—much less any Member of Congress—thought that the phrase "any other law enforcement officer," contrary to its plain meaning, included only law enforcement officers "acting in a customs or tax capacity."

D. Treating Bureau Of Prisons Officials As "Law Enforcement Officers" For Purposes Of The Detention-Of-Property Exception Is Consistent With The Purposes Of The FTCA's Exceptions More Generally

Petitioner also contends (Br. 33) that the purposes behind the FTCA's exceptions "confirm[] that Congress intended the [detention-of-property] exception to exclude claims arising from detentions of property by only officers engaged in customs and tax activities." Petitioner's reliance on the purposes behind the FTCA's exceptions, like his reliance on the legislative history of Section 2680(c), is unavailing. A reading of the detention-of-property exception that reaches all law enforcement officers not only is consistent with the plain language of Section 2680(c), but also furthers Congress's underlying policy objectives.

1. In *Kosak* v. *United States*, *supra*, this Court held that, by exempting "claim[s] arising in respect of * * * the detention of any goods or merchandise by any officer of customs," Section 2680(c) reached not only claims for damage caused by the act of detention itself, but also claims resulting from the negligent handling or storage of detained property. 465 U.S. at 854. In so holding, the

Court explained that "our interpretation of the plain language of [Section 2680(c)] accords with what we know of Congress' general purposes in creating exceptions to the Tort Claims Act." *Id.* at 858. The Court added that it was considering those purposes "merely to ensure that our construction is not undercut by any indication that Congress meant the exception [in Section 2680(c)] to be read more narrowly." *Id.* at 858 n.16. The Court then noted that "[t]he three objectives most often mentioned in the legislative history as rationales for the enumerated exceptions" were "ensuring that 'certain governmental activities' not be disrupted by the threat of damages suits; avoiding exposure of the United States to liability for excessive or fraudulent claims; and not extending the coverage of the [FTCA] to suits for which adequate remedies were already available." *Id.* at 858.

2. Petitioner appears to concede (Br. 35 n.30) that an FTCA exception need only be supported by one of those three congressional purposes. In fact, like the Court's reading of Section 2680(c) in *Kosak*, a reading of Section 2680(c) that encompasses claims concerning the detention of property by all law enforcement officers is consistent with all three. First, such a reading ensures that important governmental activities are not disrupted by the threat of damages suits. The most common type of claim that petitioner's construction of Section 2680(c) would permit are claims (such as petitioner's) by prisoners challenging the loss of, or damage to, their personal property, typically during an inter- or intra-prison transfer. See, *e.g.*, *ABC* v. *DEF*, No. 06-1362, 2007 WL 2500738, at *1 (2d Cir. Sept. 5, 2007); *Bramwell* v. *United States Bureau of Prisons*, 348 F.3d 804, 805-806 (9th Cir. 2003), cert. denied, 543 U.S. 811 (2004); *Chapa*, 339 F.3d at 389. The Bureau of Prisons, of course, rou-

tinely conducts such transfers, and Congress could reasonably have concluded that the threat of liability from (and litigation over) loss of, or injury to, personal property would serve as a deterrent to such transfers even when they would serve important penal objectives.

While claims by prisoners are the most common type of claim that petitioner's construction would affect, that construction would also open the way for claims based on the detention of property by law enforcement officers in a variety of other contexts. See, *e.g.*, *Bazuaye*, 83 F.3d at 483 (postal inspectors); *Kurinsky* v. *United States*, 33 F.3d 594, 595 (6th Cir. 1994) (Federal Bureau of Investigation agents), cert. denied, 514 U.S. 1082 (1995); *Cheney* v. *United States*, 972 F.2d 247, 248 (8th Cir. 1992) (per curiam) (drug task force agents); *Ysasi*, 856 F.2d at 1522 (Border Patrol agents); *United States* v. *2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1484 (10th Cir.), cert. denied, 469 U.S. 825 (1984) (Department of Agriculture inspectors); *United States* v. *Lockheed L-188 Aircraft*, 656 F.2d 390, 392-393 (9th Cir. 1979) (Federal Aviation Administration officials). This Court's reasoning in *Kosak* with regard to claims against customs officers is equally valid with regard to those claims. As the Court explained, the power to detain property not only is a vital investigative tool, but is "[o]ne of the most important sanctions available * * * in ensuring compliance with the * * * laws." 465 U.S. at 859. In enacting Section 2680(c), "Congress may well have wished not to dampen the enforcement efforts of the [government] by exposing [it] to private damages suits by disgruntled owners of detained property." *Ibid.*

Second, a reading of Section 2680(c) that encompasses claims concerning the detention of property by all law enforcement officers avoids exposing the govern-

ment to liability for fraudulent claims. Although law enforcement agencies typically take inventories of detained property, those inventories do not always contain exhaustive details concerning the condition and other particulars of the property. See, *e.g.*, BOP, U.S. Dep't of Justice, *Program Statement No. 5800-12, Receiving and Discharge Manual*, 4-12 to 4-14 (1998) <www.bop.gov/policy/progstat/5800012.pdf> (discussing form used for inventories of prisoners' personal property). As a result, the Government will often "be in a poor position to defend a suit in which the owner [of property] alleged that [an] item was returned in damaged condition." *Kosak*, 465 U.S. at 859. And the concern that the government will be exposed to fraudulent or frivolous claims is particularly acute in the prison context, as both this Court and Congress have recognized. See, *e.g.*, *Jones* v. *Bock*, 127 S. Ct. 910, 914 (2007); Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e *et seq.* The BOP reports that, in the last three years alone, it has received more than 12,000 administrative tort claims from prisoners for lost or damaged property. With regard to suits concerning the detention of property by BOP officials (and by other law enforcement officers), "Congress may have reasoned that the frequency with which the Government would be obliged to pay undeserving claimants if it waived immunity from such suits offset the inequity, resulting from retention of immunity, to persons with legitimate grievances." *Kosak*, 465 U.S. at 859-860.

Third, a reading of Section 2680(c) that encompasses claims concerning the detention of property by all law enforcement officers excludes coverage for suits for which adequate remedies were at least arguably already available. At common law, other law enforcement offi-

cers, no less than customs officers, could potentially be held liable for damages to detained property on a theory of negligence. See, *e.g.*, Restatement of Torts (Second) § 265 illus. 1-2, at 500-501 (1965) (cattle inspectors and officers of the peace); Joseph Story, *Commentaries on the Law of Bailments* § 620, at 626 (8th ed. 1870) (officers of the courts); cf. *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U.S. 401, 404-405 (1899) (suit against marshal based on improper seizure of property); *Jones* v. *Simpson*, 116 U.S. 609, 610 (1886) (same).[17] Although it is true that, at the time of the FTCA's enactment, customs officers and internal revenue officers (unlike some other law enforcement officers) could remove claims against them to federal court, see Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171; Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198,[18] and "collectors" and "other officers of the revenue" could obtain indemnification from the government under certain circumstances, see Act

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[17] In addition, since before the enactment of the FTCA, federal agencies (including law enforcement agencies) have had the authority to settle administrative claims for not more than $1000 resulting from damage to, or loss of, property caused by an employee's negligence. See 31 U.S.C. 3723. Regardless of the outcome of this case, that statute would give the BOP the authority to settle most, if not all, of the claims for lost or damaged property brought by federal prisoners. The BOP reports that, notwithstanding the government's position on the availability of an FTCA claim, the BOP routinely settles administrative claims for lost or damaged property; in fact, in the last three years alone, the BOP has settled more than 1,100 such claims.

[18] In 1948, two years after the enactment of the FTCA, Congress expanded the preexisting removal statutes to allow removal by any federal officer sued for an act under color of his office. See 28 U.S.C. 1442(a).

of Mar. 3, 1863, ch. 76, § 12, 12 Stat. 741,[19] Congress may well have concluded that the availability of a common-law remedy against law enforcement officers in their individual capacities was sufficient.[20]

3. Perhaps in recognition of the fact that the government's reading of Section 2680(c) would unquestionably be consistent with the first two purposes of the FTCA's exceptions, petitioner contends that, in *Kosak*, this Court suggested that "Congress' '*only* arguably relevant' purpose for enacting *§ 2680(c)*" was to avoid duplication of remedies. Br. 35 (quoting *Kosak*, 465 U.S. at 859 n.17); see Br. 38. *Kosak* itself, however, belies that contention. In *Kosak*, the Court expressly concluded that its reading of Section 2680(c) was "certainly consistent" with the first two purposes of the FTCA's exceptions (protecting important government functions and curtailing liability for fraudulent claims), 465 U.S. at 859, and "[t]o a lesser extent * * * consistent" with the

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[19] It is far from clear whether the federal indemnification statute (now codified, as amended, at 28 U.S.C. 2006 (Supp. IV 2004)), which refers only to "collector[s]" and "other revenue officer[s]," would provide indemnification against property claims for all of the officers covered by petitioner's reading of Section 2680(c): *i.e.*, not only any officer of customs or excise, but also any other law enforcement officer "acting in a customs or tax capacity."

[20] In 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act, which allows the federal government to substitute itself as the defendant in a tort action against a federal employee (and to remove such an action from state court to federal court) upon certification by the Attorney General that the employee was acting within the scope of his duties. 28 U.S.C. 2679(d). The government may then seek to dismiss any tort claim (including common-law claims brought against customs officers or other law enforcement officers) for which its immunity is not waived under the FTCA. See *United States* v. *Smith*, 499 U.S. 160, 161-162 (1991).

third (avoiding duplication of remedies), *id.* at 860. And far from suggesting that Congress's "only arguably relevant" purpose in enacting Section 2680(c) was avoiding the duplication of remedies, the Court merely noted that "the only arguably relevant *specific statement* as to the purpose of § 2680(c)" in the legislative history was a statement made by Judge Holtzoff in testimony before Congress, *id.* at 859 n.17 (emphasis added)—a statement that the Court correctly proceeded to discount, on the ground that it pertained to "the adequacy of existing remedies as a justification for the portion of the provision pertaining to the recovery of improperly collected taxes" and not "the portion of the provision pertaining to the detention of goods," *ibid.* (citing *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 38 (1940)).[21]

Petitioner also contends (Br. 36) that other legislative history of Section 2680(c) "supports the Court's * * * suggestion that Congress enacted § 2680(c) with only the third general purpose * * * in mind." Like Judge Holtzoff's testimony, however, that legislative history suggests only that Congress enacted the *first* portion of Section 2680(c), which exempts claims concerning "the assessment or collection of any tax or customs duty," for the purpose of avoiding duplicative remedies: *i.e.*, because an aggrieved person could bring a

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[21] The other cases cited by petitioner (Br. 36) do not support the proposition that Section 2680(c) was solely intended to avoid duplicative remedies. See *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 427 n.5 (1995) (quoting only the first portion of Section 2680(c)); *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 464 n.4 (1980) (per curiam) (stating that "[t]he purpose [of Section 2680(c)] was to avoid duplication," but citing only Judge Holtzoff's testimony).

refund action for any tax or customs duty that he believed he did not owe. The various committee reports petitioner cites are readily distinguishable on the ground that they concern pre-1931 versions of the bill, which contained only the first portion of what is now Section 2680(c), and did not contain a detention-of-property exception. See Br. 37. The only other authority petitioner cites is a statement by O.R. McGuire, counsel to the Comptroller General, who testified merely that claims concerning "the assessment or collection of any tax or customs duty" are "taken care of under the taxation or customs laws * * * to a large extent." *1932 Hearing* 18. There is no evidence in the legislative history to suggest that Congress's sole purpose in adopting the detention-of-property clause was to avoid duplication of remedies—much less that a broader construction of that clause would fail sufficiently to serve that purpose.

4. Finally, petitioner notes (Br. 33) that, by including a broad waiver of the government's sovereign immunity in the FTCA, Congress intended to relieve itself of the burden of having to pass private bills in order to afford relief to tort claimants. Notably, however, petitioner cites no evidence that Congress was particularly burdened with requests for private bills from individuals with claims concerning the detention of property by "other" law enforcement officers.[22] Nor, for that matter, does petitioner contend that Congress has been burdened with similar requests in the sixty years since the

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[22] Although this Court has noted that a number of private bills had been passed on behalf of federal prisoners at the time of the FTCA's enactment, see *United States* v. *Muniz*, 374 U.S. 150, 154 & n.7 (1963), all of the bills cited by the Court involved claims for personal injury, rather than claims for property damage.

enactment of the FTCA, despite the fact that courts in much of the country have construed the FTCA to preclude relief on such claims. As with claims covered by the FTCA's other exceptions, Congress retains the power to pass private bills in the event that it concludes that such claims are meritorious. More pertinently, should Congress wish categorically to subject the United States to liability for claims concerning the detention of property by law enforcement officers who are not "acting in a customs or tax capacity," it can always amend Section 2680(c) to add petitioner's proposed limitation. That limitation, however, cannot be derived from the text of the current statute, as the court of appeals correctly held.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1346 provides in relevant part:

United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

* * * * *

2. 28 U.S.C. 2671 provides:

Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

3. 28 U.S.C. 2672 provides:

Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

4. 28 U.S.C. 2673 provides:

Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

5. 28 U.S.C. 2674 provides:

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

6. 28 U.S.C. 2675 provides:

Disposition by federal agency as pre-requisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

7. 28 U.S.C. 2676 provides:

Judgment as bar

The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

8. 28 U.S.C. 2677 provides:

Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

9. 28 U.S.C. 2678 provides:

Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

10. 28 U.S.C. 2679 provides:

Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such ac-

tion or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be

subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

11. 28 U.S.C. 2680 provides:

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[1]

(d) Any claim for which a remedy is provided by sections 741-750, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

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[1] So in original.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

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IN THE

Supreme Court of the United States

ABDUS-SHAHID M.S. ALI, PETITIONER

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE

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No. 06-9130

ABDUS-SHAHID M.S. ALI, PETITIONER

v.

FEDERAL BUREAU OF PRISONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The court of appeals gave the Federal Tort Claims Act's customs and tax exception, 28 U.S.C. 2680(c), unintended breadth when it held that the exception's detention of property clause barred petitioner's claim for the loss of his property by federal prison officials. As petitioner's opening brief explains, the exception's text establishes, and its legislative history and underlying purpose confirm, that Congress intended to preserve sovereign immunity for only claims arising out of the detention of property by customs, tax, and other law enforcement officers *acting in a customs or tax capacity*. Respondents labor to hijack these indicators of congressional intent. In the end, however, respondents cannot support their expansive and acontextual construction of the exception because their interpretation rests on a selective reading of the statute, the legislative record, and this Court's relevant precedents. In contrast, a thorough ex-

amination of those interpretive guides reveals that Congress intended § 2680(c) to bar suits arising out of law enforcement officers' attempts to enforce the revenue laws and that the provision's detention of property clause was intended to preserve sovereign immunity for property torts committed only by law enforcement officers doing the same. The court of appeals erred in holding otherwise and reversal is warranted.

I. RESPONDENTS' EXPANSIVE READING OF § 2680(C)'S DETENTION CLAUSE IS INCONSISTENT WITH THIS COURT'S PLAIN TEXT APPROACH TO STATUTORY INTERPRETATION

1. The focus on revenue collection in § 2680(c)'s text is unmistakable. In addition to preserving sovereign immunity for claims arising out of "the detention of goods" and "merchandise" "by any officer of customs or excise," the statute also preserves sovereign immunity for claims arising out of "the assessment or collection of any tax or customs duty." 28 U.S.C. 2680(c). Notwithstanding these strong contextual cues as to the proper reach of the detention clause's residual "any other law enforcement officer" phrase, respondents assert that the phrase "plain[ly]," "unambiguously," and "straightforward[ly]" preserves the United States' sovereign immunity for property torts arising out of detentions of property by all law enforcement officers regardless of capacity.[1] U.S. Br. 6-8, 9-10, 14, 16, 20, 23, 29-30 & n.13, 37. In so

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[1] All of respondents' flawed arguments seemingly flow from this flawed premise that the statutory test at issue is so plainly correct as to preclude any counterarguments. See Resp. Br. 10 (arguing that CAFRA "confirms" that the detention of property clause "should be read to mean what it says: *i.e.*, that claims concerning the detention of property by any law enforcement officer are exempt from the FTCA's waiver of sovereign immunity"), 37 (arguing that the legislative history evinces no indication "that anyone in the Department of Justice – much less any Member of Congress – thought that the phrase 'any other law enforcement officer,' contrary to its plain meaning, included only law enforcement officers "acting in a customs or tax capacity"), 37

asserting, however, respondents (like the court of appeals below and other courts that have ruled similarly, see Pet. Br. 19-20) have wrestled the phrase from its context and ask this Court to excise fourteen words from the full statute.[2] Such an unmoored reading of legislation, as petitioner's opening brief explains (at 11-13), is antithetical to "the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citations omitted); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

The related *ejusdem generis* and *noscitur a sociis* canons applied by petitioner in his opening brief (at 13-17) account for § 2680(c)'s contextual cues and dictate that § 2680(c)'s detention clause be given a limited construction that is faithful to its customs- and tax-focused surroundings. Indeed, all five courts of appeals to have considered the canons found that they compel the narrow context-based construction of § 2680(c) offered by petitioner here.[3] Respon-

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("A reading of the detention-of-property exception that reaches all law enforcement officers not only is consistent with the plain language of Section 2680(c), but also furthers Congress's underlying policy objectives.").

[2] The detention clause has twenty-two words. Under respondents' construction, it would effectively have only eight: "detention of * * * property * * * by any * * * law enforcement officer." How that construction is so plainly correct as to preclude any counterargument, as respondents seemingly suggest, is mystifying.

[3] See *ABC v. DEF*, No. 06-1362-cv, --- F.3d ---, 2007 WL 2500738, at *3 (CA2 Sept. 5, 2007); *Andrews v. United States*, 441 F.3d 220, 223-25 (CA4 2006); *Ortloff v. United States*, 335 F.3d 652, 658 (CA7 2003), cert. denied, 540 U.S. 1225 (2004); *Bazuaye v. United States*, 83 F.3d 482, 484 (CADC 1996); *Kurinsky v. United States*, 33 F.3d 594, 596-97 (CA6 1994), cert. denied, 514 U.S. 1082 (1995).

dents' attempt to brush aside the canons and the strong contextual cues to which they give meaning is unavailing.

2. As a threshold matter, respondents assert (at 9-10, 17, 21) that the canons are inapplicable because the detention clause's residual phrase "has a clear meaning" and is "not ambiguous." Critically, however, the Court already acknowledged "the ambiguity as to the reach of the phrase 'any other law enforcement officer'" over twenty years ago when it expressly declined to decide in *Kosak v. United States*, 465 U.S. 848, 852 n. 6 (1984), "what kinds of 'law-enforcement officer[s],' other than customs officials, are covered by the exception." *Ortloff*, 335 F.3d at 657 & n.4 (quoting *Formula One Motors, Ltd. v. United States*, 777 F.2d 822, 823 (CA2 1985)), cert. denied, 540 U.S. 1225 (2004). It would be absurd to think that this Court would go out of its way to identify the unclear scope of the detention clause's residual phrase – an issue having nothing to do with the question presented in *Kosak* – if the clause was susceptible of only one plausible interpretation.

Moreover, the fact that the phrase "invites at least two plausible interpretations" is clear. *Bazuaye*, 83 F.3d at 483. A significant number of circuits have not only found the phrase ambiguous and applied the canons to interpret it but also interpreted it consistent with the construction offered by petitioner here. All-in-all, five courts of appeals and a total of sixteen circuit judges have interpreted the phrase this way. See note 2, *infra*; see also *Formula One Motors*, 777 F.2d at 825 (Oakes, J., concurring); *A-Mark, Inc. v. Secret Serv.*, 593 F.2d 849, 850-51 (CA9 1978) (Tang, J., concurring). If § 2680(c) is, as respondents suggest, so clear that petitioner's interpretation of it is "profoundly atextual" (at 6), "muscular (and indeed, virtually unprecedented)" (at 23), then sixteen circuit judges not only erred in resolving the question presented but erred grievously.

3. Respondents are also incorrect when they assert (at 17-18) that the canons are "particularly" inapplicable "when the general phrase at issue is introduced with the expansive

term 'any.'" Were that the case, at least two of this Court's recent decisions would have been decided differently. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001) (applying *ejusdem generis* to limit "*any other* class of workers engaged in foreign or interstate commerce" in § 1 of the Federal Arbitration Act, 9 U.S.C. 1 (emphasis added), to transportation workers); *Guitierrez v. Ada*, 528 U.S. 250, 254-58 (2000) (applying *noscitur a sociis* to limit "*any* election" in § 1422 of the Guam Organic Act, 48 U.S.C. 1422 (emphasis added), to gubernatorial elections).

4. a. Respondents also argue (at 19) that *ejusdem generis* is inapplicable for the additional reason that § 2680(c)'s "any other law enforcement officer" phrase does not "follow[] a list of specific phrases." Under respondents' articulation of the canon, *ejusdem generis* would appear to apply to the detention clause only if Congress had written it to read "any customs officer, any excise officer, or any other law enforcement officer." Notably, however, respondents do not claim that the phrase "any customs officer [or] any excise officer" would have a different meaning than Congress' more concise use of the phrase "any officer of customs or excise." Nonetheless, respondents would seemingly require Congress to use more words notwithstanding that fewer have sufficed to convey the same point. Petitioner is aware of no support for such a proposition. Nor is petitioner aware of any authority for the proposition that a grouping must bear parallel construction to be a "list." Put simply, "any officer of customs or excise or any other law enforcement officer" is no less a list than "any customs officer, any excise officer, or any other law enforcement officer" or the lists to which the Court has applied *ejusdem generis* recently.[4]

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[4] See, *e.g.*, *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 382 (2003); *Circuit City Stores*, 532 U.S. at 118.

Respondents are likewise mistaken when they argue (at 20) that *ejusdem generis* should not apply because "petitioner's construction is too narrow." That argument would have persuasive force if, as in *James v. United States*, 127 S. Ct. 1586, 1592 (2007), respondents were able to offer a "mo[re] relevant common attribute" on which to base a reasonable construction of the detention clause.[5] They offer none.

b. Respondents next claim (at 20-21) that *noscitur a sociis* is specifically inapplicable because § 2680(c) contains "weak" contextual cues that Congress intended the detention clause's residual phrase to be limited. Neither the statute's text nor this Court's precedents applying *noscitur a sociis* supports respondents' cramped reading. The detention clause itself contains four cues that Congress had customs and tax officers in mind when it enacted the clause. It reaches the detentions of "goods" and "merchandise," both of which have historically been associated with revenue collection,[6] by officers of "customs" and "excise," "whose job is to enforce the tax and customs laws." *Andrews*, 441 F.3d at 224-25. The assessment clause of the same provision provides four additional cues by reaching the "assessment" or

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[5] Indeed, the folly of respondents' argument is best exemplified by their own hypothetical (at 20). Taking respondents' example, a statute could list "spoons, forks, and any other utensil." In that context, "any other utensil" could have three meanings: (1) any utensil used for eating (e.g., knives and chopsticks); (2) any kitchen utensil (e.g., knives, chopsticks, whisks, and spatulas); or (3) any utensil whatsoever (e.g., kitchen utensils and dental utensils). The same is not true here. The residual phrase of § 2680(c)'s detention clause can have only two possible constructions, and petitioner's is the one more faithful to the text.

[6] See, *e.g.*, Act of July 31, 1789, § 22, 1 Stat. 42 (if an importer, "with design to defraud the revenue," did not invoice his goods at their actual cost at the place of export, "all such goods, wares or merchandise, or the value thereof * * * shall be forfeited").

"collection" of any "tax" or "customs duty," the specific actions of customs and tax officers.

This Court, as petitioner's opening brief explains (at 15-17), has repeatedly applied *noscitur a sociis* to such cues to avoid giving superficially broad language (like the detention clause's residual "any other law enforcement officer" phrase) "unintended breadth." *E.g.*, *Dolan v. Postal Serv.*, 546 U.S. 481, 486 (2006) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); see also *Gutierrez*, 528 U.S. at 254-55, 257. Notwithstanding that petitioner discussed *Dolan*, *Jarecki*, and *Gutierrez* at length in his opening brief – and that the Court in *Dolan* applied *noscitur a sociis* to another FTCA exception (§ 2680(b)) just two Terms ago – respondents do not so much as cite *Dolan* or *Jarecki*. While respondents do discuss *Gutierrez* and attempt to distinguish it (at 22-23) from this case, their efforts fall short.

Not only do respondents fail to mention in their comparison of this case with *Gutierrez* the strong contextual cues in the detention clause itself, they criticize (at 22, 23) petitioner for relying on the cues contained in the assessment clause that, they claim, is in "another portion of the statute" and not directly "implicated in this case." The premise of that criticism is flatly misplaced. The assessment clause does not appear "in another portion of the statute;" it appears in the very same subsection – and was enacted at the same time – as the statutory language in dispute. In light of this Court's stated commitment to not read disputed language "in isolation," but instead on a "reading of the whole statutory text," those cues are not only relevant but compel the narrow construction offered by petitioner. *Dolan*, 546 U.S. at 486.

5. As petitioner's opening brief further demonstrates, the court of appeals' construction would render the detention clause's residual phrase inoperative because "[c]ustoms and tax officers, who are indisputably law enforcement officers, would be subsumed by the broader category of 'other law enforcement officer[s].'" Pet. Br. 17-18 (citing *Ortloff*,

335 F.3d at 659; *Bazuaye*, 83 F.3d at 484 (footnote omitted)); see also *ABC*, 2007 WL 2500738 at *3. Respondents' rejoinder (at 24) that "[c]ustoms or excise officers would be covered by [the 'any officer of customs or excise] phrase, not the successive (and mutually exclusive) phrase 'any other law enforcement officer'" has already been rejected by this Court. See *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 78-79 (1990).[7]

Respondents fare no better when they assert (at 24) that petitioner's reading would "seemingly render the phrase "any other law enforcement officer" entirely, or almost entirely superfluous" because "it is far from clear" when officers other than customs or tax officers "are 'acting in a customs or tax capacity.'" In addition to the examples cited by petitioner in his opening brief (at 18-19 & n.12), the law reporters are littered with cases in which officers other than customs or tax officers detain property while acting to enforce customs or tax laws.[8]

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[7] In *Arcadia*, the Court was asked whether certain Federal Energy Regulatory Commission and Securities and Exchange Commission orders imposed requirements sufficient to trigger the conflict preemption provision of § 318 of the Federal Power Act. For § 318 to apply, the administrative requirement must have been imposed "with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter." 16 U.S.C. 825q (2004) (emphasis added). The court of appeals interpreted the statute broadly "in effect adding to [its] detailed list 'or anything else.'" 498 U.S. at 78. This Court sensibly rejected that construction because it "render[ed] the proceeding enumeration of specific subjects entirely superfluous." *Ibid.*

[8] *United States v. Gurr*, 471 F.3d 144 (CADC 2006) (FBI's detention of financial documents seized by Customs agent during border search); *United States v. Long*, 108 F.3d 1377, 1997 WL 130079 (Table) (CA6 1997) (detention of video tapes by postal inspectors on suspicion of receiving imported obscene material); *Evans v. McKay*, 869

Far from rendering any of § 2680(c) superfluous, petitioner's construction of the statute not only gives full effect to all of its language but ensures that Congress' unmistakable focus on revenue collection is honored.

II. NEITHER THE CIVIL FORFEITURE-FOCUSED AMENDMENTS TO § 2680(C) IN 2000 NOR THEIR LEGISLATIVE HISTORY SUPPORTS RESPONDENTS' EXPANSIVE READING OF THE STATUTE'S DETENTION CLAUSE

1. As petitioner explained in his opening brief (at 46-49), Congress' enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202, and addition of a civil forfeiture-focused "exception to the exception" at the end of § 2680(c) is irrelevant to this case. Petitioner's claim does not arise under the new CAFRA clause, as respondents acknowledge (at 22). And because, as respondents seemingly concede (at 11 n.4), CAFRA did not change in any meaningful way the language of the detention clause under which the court of appeals dismissed petitioner's claim, the Act's reforms have no bearing on this case.

Nonetheless, respondents argue (at 13-14) that "CAFRA confirms that the FTCA's detention-of-property exception was intended to reach *all* law enforcement officers,

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F.2d 1341 (CA9 1989) (seizure of supply of tax-free cigarettes by law enforcement officers of the Bureau of Indian Affairs because possessed by non-Indian); *United States v. 2,200 Paper Back Books*, 565 F.2d 566 (CA9 1977) (seizure of books by United States Marshal for violation of statute prohibiting importation of obscene material); *Taylor v. United States*, 550 F.3d 983 (CA4 1977) (seizure of hashish on merchant vessel by customs officer and DEA agents); *Cancino v. United States*, 196 Ct. Cl. 568 (1971) (local police officer's seizure of currency to satisfy federal tax lien); *United States v. Riley*, 85 F. Supp. 533 (E.D. Pa. 1949) (local police officers' seizure an unregistered still and a quantity of tax unpaid whiskey); *Appeal of Hughes*, 1 B.T.A. 944 (1925) (local police officers' seizure of taxpayer's private stock of liquors for failure to pay taxes).

not merely those 'acting in a customs or tax capacity.'" That is simply not the case, as all three courts of appeals to have considered the CAFRA amendments have held. See *ABC*, 2007 WL 2500738, at *4-*5; *Dahler v. United States*, 473 F.3d 769, 772 (CA7 2007) (*per curiam*); *Andrews*, 441 F.3d at 226-27.

"CAFRA merely ensures that § 2680(c) does not foreclose claims related to property that has been seized for forfeiture in the enumerated circumstances." *Dahler*, 473 F.3d at 772. Respondents assert (at 11) that one such requirement – that the "property was seized for the purpose of forfeiture under *any* provision of Federal law providing for the forfeiture of property" – demonstrates Congress' understanding that the phrase "any other law enforcement officer" is broad. 28 U.S.C. 2680(c)(1). That is true, however, "only if one makes the invalid assumption that officers acting in a customs or excise capacity can effect forfeitures only under the customs or excise laws." *ABC*, 2007 WL 2500738 at *5. Although respondents assert (at 12) that "[c]ustoms and internal revenue officers do not pursue forfeitures under the vast majority of civil forfeiture statutes," they noticeably do not go so far as to suggest that customs and revenue officers pursue forfeitures *only* under the customs or revenue laws.

All-in-all, "[t]he text of CAFRA says nothing about the type of activities in which law enforcement officers must be engaged in order for § 2680(c) to initially apply and thus immunize the government from suit." *Dahler*, 473 F.3d at 772. The resolution of that issue, therefore, depends exclusively on the detention clause's text and the intentions of the Congress that enacted it in 1946. The text of CAFRA itself confirms this.

2. Far from broadening the reach of the detention clause, CAFRA affirmatively replicated the detention clause's language when it also required as a prerequisite to a CAFRA claim that the subject property must have been "in the possession of any officer of customs or excise or any other law enforcement officer" when damaged or lost. 28

U.S.C. 2680(c). It would have been easy for Congress to broaden the scope of the detention clause had it wanted, but it affirmatively declined that opportunity. See H.R. 1745, 105th Cong., 1st Sess. § 106 (1997). That inaction,[9] coupled with Congress' preservation and replication of the detention clause's language, is conclusive evidence that Congress intended to adopt the detention clause's original meaning and carry it forward. The proper construction of the detention clause, therefore, must be based on its text and the understanding of the Congress that enacted it in 1946. Nothing that certain members of Congress may have expressed over fifty years later during CAFRA's drafting is at all relevant – a treatment that accords with the Court's oft-repeated admonitions that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 165 n.27 (1983) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 118 n.13 (1980)), and that "it is the intent of the Congress that enacted [the language in dispute] that controls," *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.9 (1977).

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[9] Respondents criticize (at 29 n. 13) petitioner for relying in his opening brief (at 47 n.42) on this congressional inaction. That criticism, however, is misplaced. This Court has "relied on congressional acquiescence when there is evidence that Congress considered and rejected the '*precise issue*' presented before the Court." *Rapanos v. United States*, 126 S. Ct. 2208, 2231 (2006) (emphasis in original; internal quotation marks omitted); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983) ("Nonaction by Congress is not often a useful guide, but the nonaction here is significant."). Congress considered the "precise issue" before this Court in this case – *viz.*, whether § 2680(c)'s detention clause should be broadly bar claims arising out of the detentions of property by all law enforcement officers – when it took up H.R. 1745. The fact that it rejected H.R. 1745 demonstrates its intent to permit courts to continue to construe the detention clause narrowly.

III. NOTHING IN THE LEGISLATIVE HISTORY OF § 2680(C) SUPPORTS RESPONDENTS' EXPANSIVE READING OF THE PROVISION

1. As detailed in petitioner's opening brief (at 25-32), the legislative history of § 2680(c) confirms that neither Congress nor the Department of Justice official who drafted the provision's detention of property clause intended the clause to preclude government liability for property torts committed by law enforcement officers acting outside the customs and tax contexts. In fact, respondents concede (at 31, 35) that every description of § 2680(c) offered by Congress (both before and after § 2680(c) was expanded to include the detention of property clause) referred to the provision as dealing solely with customs and tax enforcement functions. Notwithstanding this overwhelming evidence of legislative understanding, respondents boldly suggest (at 31) that § 2680(c)'s legislative history actually supports their interpretation of the statute. That suggestion does not withstand scrutiny.

2. The only evidence on which respondents rely affirmatively (at 32) for their assertion that the legislative history supports their construction is the explanatory report that then-Special Assistant to the Attorney General (and later District Judge) Alexander Holtzoff included with a draft tort claim bill that he authored in 1931.[10] In that report, Judge Holtzoff explained that he "expanded the [previous customs and tax] exception to include immunity from liability in respect of loss in connection with the detention of goods or merchandise by an officer of customs or excise." Alexander Holtzoff, *Report on Proposed Federal Tort Claims Bill* 16 (1931) [hereinafter "Holtzoff Report"]. No-

[10] The parties agree (Pet. Br. 27; Resp. Br. 31-32 & n.14) that what is now § 2680(c)'s detention of property clause was "almost certainly" drafted by Judge Holtzoff and that his views of the clause's proper scope are relevant to the Court's resolution of the question presented.

where in that sentence of – or anywhere else in – the report did he indicate that he intended to "include immunity" in connection with the detention of goods by law enforcement officers beyond the customs and tax contexts.

Notwithstanding that conspicuous omission, respondents argue (at 33) that the report indicates that Judge Holtzoff was of the "view that all law enforcement officers would by covered by the detention of property exception, regardless whether they were 'acting in a customs or tax capacity.'" They base this argument on the next sentence of Judge Holtzoff's report, in which he observed that the detention of property clause "has special reference to the detention of imported goods in appraisers' warehouses or customs houses, as well as seizures by law enforcement officials, internal revenue officers, and the like." *Ibid.* Respondents offer no explanation, however, for why, if their reading of Judge Holtzoff's report is correct, he would state expressly that his bill would include immunity for "officer[s] of customs or excise" but not "law enforcement officals." Perhaps it is because the better view, as expressed by petitioner in his opening brief (at 29), is that Judge Holtzoff's reference to "law enforcement officials, internal revenue officers, and the like" immediately following his reference to "appraisers' warehouses or customs houses" indicates his understanding that immunity would turn on whether "law enforcement officials, internal revenue officials, and the like" were engaged in revenue collection or, instead, ordinary law enforcement activities.[11]

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[11] Respondents' additional suggestion (at 34 n.15) that Judge Holtzoff intended § 2680(c) to "preserv[e] the federal government's immunity against" "prisoner claims for property damage" is baseless. Respondents correctly explain that "in his report, Judge Holtzoff noted that the New York Attorney General had informed him that, under that State's tort statute, 'claims for damages by prison inmates ha[d] been on the increase'" but "that '[t]his source of liability [was] expressly eliminated by [his] proposed [federal tort claim] bill.'"

IV. RESPONDENTS' EXPANSIVE READING OF § 2680(C) IS AT ODDS WITH THE CONGRESSIONAL PURPOSE BEHIND THE PROVISION

1. Petitioner's opening brief demonstrates (at 33-45) that Congress could not have intended to bar claims arising out of detentions of property by all law enforcement officers regardless of their capacity because such a bar would be inconsistent with the congressional purpose behind § 2680(c). As the Court has repeatedly suggested and the FTCA's legislative history confirms, Congress' sole purpose for enacting § 2680(c) was to prevent the FTCA from creating a redundant federally funded remedy for the negligent acts of revenue collectors.[12] On all three occasions that the Court has referenced Congress' purpose for enacting § 2680(c), it has cited only the avoidance of creating a duplicative remedy. *See Kosak*, 465 U.S. at 858 & n.17; *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427 n.5 (1995); *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464 n.4 (1980) (*per curiam*). Likewise, on all four occasions before Congress expanded the provision to cover detentions of property, Congress cited only the avoidance of creating a duplicative remedy as a purpose. See Pet. Br. 36-37. Perhaps more importantly, on both occasions in which the individuals responsible for ex-

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Resp. Br. 34 n.15 (quoting Holtzoff Report, *supra*, at 14). They then suggest that it was the detention of property clause that "expressly eliminated" "this source of liability." In doing so, however, they fail to acknowledge that Judge Holtzoff's draft bill proposed an exception that would bar "[a]ny claim for injury to, or death of a prisoner," Alexander Holtzoff, Proposed Federal Tort Claims Bill § 4(12) (1931); see also H.R. 5065, 72d Cong., 1st Sess. § 206(11) (1931) (same), and as respondents elsewhere acknowledge (at 44 n.22), all pre-FTCA requests by prisoners for private claim legislation "involved claims for personal injury, rather than claims for property damage."

[12] Respondents seemingly concede (at 38) that an FTCA exception need only be supported by one congressional purpose.

panding the provision (Judge Holtzoff and Col. O.R. McGuire) testified as to the purpose of the expanded provision, they cited the same purpose as well. See *id.* at 37-38.[13]

2. Respondents are unwilling to concede that preventing the FTCA from creating a redundant federally funded remedy for the negligent acts of revenue collectors was the sole purpose behind § 2680(c). This comes as no surprise, however, because admission of this purpose would be fatal to respondents' position. After all, respondents admit (at 41-42) that at the time of the FTCA's enactment, there was no risk of duplicating remedies payable by the federal fisc for the tortious conduct of law enforcement officers acting outside the customs and tax contexts.[14] Respondents' position, though unsurprising, is untenable. It is unquestionably foreclosed by this Court's prior decisions.

Respondents assert (at 42) that "*Kosak* itself * * * belies th[e] contention" that Congress' only relevant purpose for enacting § 2680(c) was to avoid duplication of remedies. A faithful reading of *Kosak*, however, proves just the opposite. There, the Court observed that the "only arguably relevant specific statement as to the purpose of § 2680(c)" was Judge Holtzoff's testimony emphasizing "the adequacy of existing

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[13] Notably, respondents cite no evidence from the legislative record of a contrary purpose for § 2680(c).

[14] Respondents suggest (at 40-42) that their construction is consistent with Congress' desire to avoid duplication of a preexisting remedy because, at common law, officers other than customs and tax officers "could potentially be held liable for damages to detained property on a theory of negligence * * * * in their individual capacities." There is no merit to that suggestion. Congress' stated desire to avoid remedy redundancy concerned duplication of *federally funded* (and non-discretionary) preexisting remedies. See *Dolan*, 546 U.S. at 491 (rejecting the government's argument that an FTCA remedy would be duplicative of federally funded administrative remedies "permit[ting] only discretionary relief").

remedies." 465 U.S. at 858 n.17.[15] The Court then found that its reading of § 2680(c) was consistent with that purpose. *Id.* at 860-61. To be sure, the Court considered the other two "general purposes" underlying Congress' enactment of the § 2680 exceptions, but it did so, as petitioner's opening brief explains (at 38 n. 35, 43-44 n.38), "merely to ensure that [its] construction [was] not undercut by any indication that Congress meant the exception" to be applied differently, not because each underlying purpose must apply to each exception – much less, § 2680(c). *Id.* at 858 n.16; see also Pet Br. 35-36 n.30 (detailing how Congress considered its three "general purposes" behind the § 2680 exceptions to be disjunctive). Respondents have offered nothing persuasive to undercut this reading of *Kosak*.

Nor are respondents correct (at 43 n.21) that "[t]he other cases cited by petitioner" – *Gutierrez de Martinez* and *Hatzlachh* – "do not support the proposition that Section 2680(c) was solely intended to avoid duplicative remedies." For example, the Court could hardly have been clearer in *Hatzlachh* in its recognition of the singular purpose behind § 2680(c). There, the Court observed that certain "exemptions, such as the assessment or collection of taxes or customs duties [and] *the detention of goods by customs officers* * * * were included because various other laws provided the machinery for recovery on these claims. * * * The purpose was to avoid duplication." 444 U.S. at 462 n.4 (emphasis added). Likewise, in *Gutierrez*, 515 U.S. at 427 n.5, the Court explained that "[s]everal of the FTCA's 13 exceptions are for cases in which other compensatory regimes afford relief" and then cited, among other exceptions, § 2680(c). The Court never stated, as respondents suggest (at 43 n.21),

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[15] The parties in *Kosak* did not present the Court with many of the other statements in the legislative record and by contemporary commentators that the purpose behind § 2680(c) was the avoidance of duplication. See Pet. Br. 36-38 & n.31.

that it was referring to only § 2680(c)'s assessment *clause*. To the contrary, the Court referred to the "*exception*[]." *Ibid.* (emphasis added). Because Congress' sole purpose for enacting § 2680(c) was to avoid creation of a redundant remedy, respondents' focus (at 38-39) on Congress' other two "general purposes" is a non-starter.

3. Respondents' reliance on Congress' other two general purposes – "ensuring that 'certain governmental activities' not be disrupted by the threat of damage suits" and "avoiding exposure of the United States to liability for excessive or fraudulent claims," *Kosak*, 465 U.S. at 858 & n.17 – proves too much and risks precisely the sort of "'unduly generous interpretation[]'" that would "'defeat the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language,'" *Dolan*, 546 U.S. at 492 (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)).

To be sure, the administration of federal prisons and other federal law enforcement functions are important, but the same is true of every governmental function. For example, the functions of the Postal Service, with its 600 million daily mailings and 142 million delivery points, could be said to be sufficiently important so as to warrant sweeping insulation from private lawsuits. See *id.* at 488. The Court has been careful, however, not to read § 2680 exceptions broadly merely because governmental functions are important. A similarly measured approach is warranted in this case to avoid "swallow[ing] up Congress' waiver of immunity, given the potential number of federal law enforcement officials in our modern government's alphabet soup – *i.e.*, the DEA, EPA, FBI, FDA, FTC, INS, OSHA, SEC, or USDA, to name a few." *Ortloff*, 335 F.3d at 659.

The Court's decision in *Dolan* just two Terms ago is instructive. Stressing the importance of the Postal Service's functions, the government in that case asked the Court to construe the term "negligent transmission" in § 2680(b) in a sufficiently broad manner so as to bar the plaintiff's claim for slip-and-fall injuries resulting from a negligently placed par-

cel. 546 U.S. at 489. In rejecting the government's arguments regarding how Congress' other two "general purposes" for the § 2680 exceptions would be best served by a broad construction of § 2680(b), the Court observed that "[s]lip-and-fall liability * * * is a risk shared by any business that makes home deliveries." *Id.* at 491. Law enforcement officers who obtain private property – through seizure or otherwise – as respondents acknowledge (at 41), are bailees. Liability for the loss of or damage to a bailor's property is a risk properly shared by all bailees – particularly, the federal prison officials in this case whose bailment was not the product of a seizure.

4. Finally, even if Congress' other two general purposes were somehow relevant to the Court's resolution of this case, petitioner's narrow context-based construction of § 2680(c) is consistent with such objectives. See Pet. Br. 43-44 n.38. Respondents offer no rejoinder whatsoever to petitioner's articulation of how his construction shields the federal government's "life-blood" revenue collection functions, *Bull v. United States*, 295 U.S. 247, 259 (1935), from "disrupt[ion] by the threat of damage suits" and "exposure * * * for excessive or fraudulent claims" – both of which they certainly would have faced had § 2680(c) never been enacted. *Kosak*, 465 U.S. at 858-59.

CONCLUSION

For the foregoing reasons and those set forth in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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